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Supreme Court of the United States

OCTOBER TERM, 1951

NO. 211

MRS. ODILE V. HUBERT TUCKER, AS A STOCKHOLDER, ON BEHALF OF CRESCENT CITY LAUNDRIES, INC.,
Petitioners,

vs.

NATIONAL LINEN SERVICE CORPORATION, ET AL.,
Respondents.

Petition

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(a) WITH RESPECT TO THE CONTROVERSY PRESENTED, THE CORPORATION IS ON ONE SIDE, AND THE WRONGDOERS ARE ON THE OTHER;

(b) THE CORPORATION MUST BE REALIGNED AS A COMPLAINANT FOR THE PURPOSE OF DETERMINING DIVERSITY JURISDICTION 8

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IN THE

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NO.....

MRS. ODILE V. HUBERT TUCKER, AS A STOCKHOLDER, ON BEHALF OF CRESCENT CITY LAUNDRIES, INC.,
Petitioners,

vs.

NATIONAL LINEN SERVICE CORPORATION, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

Now comes Mrs. Odile V. Hubert Tucker, as a stockholder on behalf of Crescent City Laundries, Inc., and prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, to review here the record and judgment entered by that court in the above action on April 5, 1951 (R.419),

OPINION BELOW.

The opinion of the Court of Appeals was rendered on April 5, 1951 (R.418) and is not yet reported. Petition for Rehearing was filed April 25, 1951 (R. 420) and was denied May 10, 1951 (R.426). The opinion of the District Court is reported in 92 F. Supp. 502 and is found in (R.393).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254(1), Title 28, United States Code.

STATUTES INVOLVED.

This action was brought by Mrs. Tucker, as a stockholder, solely on behalf of Crescent City Laundries, Inc., a Maine corporation. It seeks to enforce Crescent's claims against numerous defendants, including a majority of Crescent's directors and stockholders, all of whom are citizens of states other than Maine. Said claims arose out of fraudulent breaches of trust by said directors toward said corporation whereby its property was misappropriated to said directors and others who confederated with them. Jurisdiction is based upon the requisite statutory amount in controversy between citizens of different States under Section 1332, Title 28, United States Code, which provides:

> "Section 1332(a). The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3000 exclusive of interest and costs, and is between: ***
>
> (3 Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties."

This action was filed in the United States District Court for the Northern District of Georgia under Section 1401, Title 28, United States Code, which provides:

> "Section 1401. Any civil action by a stockholder on behalf of his corporation may be prosecuted in any judicial district where the corporation might have sued the same defendants."

Extraterritorial services of process upon Crescent was made on Ernest L. McLean, Clerk of Crescent, at Augusta, Maine, under Section 1695, Title 28, United States Code, which provides:

"Section 1695. Process in a stockholder's action in behalf of his corporation may be served upon such corporation in any district where it is organized or licensed to do business or is doing business."

QUESTIONS PRESENTED

1. Are Federal courts obligated to realign the parties for jurisdictional purposes, according to their real interests in the controversy in a stockholders' derivative action, to enforce their corporation's rights against its majority directors for fraudulent breaches of trust toward it in misappropriating its assets to themselves?

2. If the injured corporation, in such an action, must be realigned as a complainant, then is the complaining stockholder to be regarded only as a formal or nominal party whose individual citizenship is immaterial in determining diversity jurisdiction?

3. May the position of the injured corporation, in such action, be fixed as a defendant because it is in antagonistic hands, where fraud of the majority directors and stockholders is the essence of the stockholders' derivative action?

SPECIFICATION OF ERRORS

The Court of Appeals erred in affirming the judgment of the District Court dismissing this action upon the ground that diversity of citizenship between the parties to the controversy, as stated in the complaint, is lacking.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Mrs. Tucker, as a preferred stockholder, instituted this stockholders' derivative action on behalf of her corporation, Crescent City Laundries, Inc., a citizen of the State of Maine. More than $3000, exclusive of interest and costs, is in dispute. Mrs. Tucker is a citizen of the State of Louisiana. Named as defendants are Crescent, a nominal defendant, and numerous real defendants, including a majority of Crescent's

directors and stockholders or their personal representatives, many of whom are citizens of the same state as Mrs. Tucker. The complaint asserts Crescent's claims against said directors and others for fraudulent breaches of trust to it, whereby its entire assets were misappropriated. The relief demanded is the impressing of a constructive trust upon certain of said assets in favor of Crescent located within the Northern District of Georgia and an accounting to Crescent as well as a personal judgment in favor of Crescent against certain of the resident defendants for the damages sustained by Crescent as a result of their participation in the fraudulent breaches of trust. The directors of Crescent abandoned their duties to it in 1942, and thereafter Crescent was disabled from continuing its regular business as a result of the acts complained of. (R. 176-215).

Jurisdiction is invoked upon the ground of amount involved and diversity of citizenship between the actual parties to the controversy, i.e., Crescent, a citizen of Maine, on one side, and the defendants whose acts are complained of, all of whom are citizens of other states, on the other.

The defendants, except Crescent, moved to dismiss on various grounds. Crescent filed no responsive pleadings. The District Court dismissed the action (R.404) for lack of diversity jurisdiction and for other reasons. (R.400). Upon appeal the Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court dismissing the action for lack of diversity jurisdiction, but did not consider other matters. (R. 418). The judgment of the Court of Appeals was controlled by its judgment affirming the judgment of the District Court for the Eastern District of Louisiana in the case of *Tucker v. New Orleans Laundries, Inc., 90 F. Supp. 290,* decided the same day. Application to this Court to review the latter decision is being filed simultaneously with the filing of this petition.

REASONS FOR GRANTING THE WRIT.

This case presents important new questions with respect to the diversity jurisdiction of the Federal courts, depending upon the proper realignment and classification of the parties in a stockholders' derivative action which asserts the injured corporation's demands against its majority directors for their fraudulent breaches of trust toward their corporation, *in instances where the injured corporation and its wrongdoing directors are citizens of different states.*

The decision of the Court of Appeals should be reviewed because:

1. This Court has never decided the question of the proper realignment and classification of the parties for the purpose of determining diversity jurisdiction in a stockholders' bill where the only demand was for a recovery for the corporation against the majority corporate directors for fraudulent breaches of trust in the misappropriation of the corporation's assets to themselves.

2. It is essential to the due administration of justice, and to the jurisdictional integrity of the Federal courts, that the rule obligating Federal courts to realign the parties for jurisdictional purposes according to their real interests in the controversy be strictly adhered to by the lower Federal courts in all civil actions.

3. It is a matter of public importance that the public policy of requiring the faithful discharge of duties by persons holding positions of trust and confidence be rigidly enforced. This Court should decide whether or not majority directors who are guilty of fraudulent breaches of trust to their corporation are disqualified, by reason of their interests being adverse to the interest of their corporation, from determining the attitude of the corporation in a stockholders' derivative action against said directors, seeking to redress such fraudulent breaches of trust.

4. Such a decision by this Court will have immediate importance far beyond the particular facts and parties involved in this case.

5. The decision of the Court of Appeals misinterpreted the decision of this Court in *Doctor v. Harrington, 196 U.S. 579,* in construing that case as holding that, for the purpose of determining diversity jurisdiction of a stockholders' derivitive action, the court is not required to realign the parties according to their real interests in the controversy because the corporation is in antagonistic hands.

6. The decision of the Court of Appeals is in conflict with the decision of this Court in *City of Indianapolis v. Chase National Bank, 314 U.S. 63,* which holds that it is the duty of Federal courts in civil actions to look beyond the pleadings and arrange the parties according to their sides in the dispute, as shown by the facts stated in the complaint.

7. The decision of the Court of Appeals is in conflict with the decision of this Court in *Stewart v. B. & O. Railroad Co., 168 U.S. 445,* which holds that for the purpose of determining diversity jurisdiction in the Federal courts in an action brought for another's benefit, regard is had to the citizenship of the real rather than the nominal plaintiff.

8. The decision of the Court of Appeals is in conflict with the decision of this Court in *Bush v. Elliott, 202 U.S. 477,* which holds that, where a person having a derivative right to enforce another's cause of action on behalf of such other person, it is the citizenship of the person whose cause of action is sought to be enforced that controls in determining the question of diversity of citizenship jurisdiction.

9. The decision of the Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *De Neufville v. New York & Northern Ry. Co., 81 F. 10,* and with the decision of the Circuit Court of Appeals

for the Third Circuit in *Laughner, et al., v. Schell, 260 F. 396,* which hold that the controversy in a stockholders' derivative action against wrongdoing directors is one between the injured corporation, on one side, and its wrongdoing directors on the other.

10. The decision of the Court of Appeals is in conflict with the decision of *Laughner v. Schell, supra,* which holds that the injured corporation should be realigned as complainant in a stockholders' derivative action to enforce its claim against its wrongdoing directors.

11. The decision of the Court of Appeals is contrary to the decision of this Court in *Hamer v. New York Railways Co., 244 U.S. 266,* which holds that the real party in interest in a derivative action brought on its behalf should be realigned as a complainant, where it is not made an adversary, to be classed for purposes of jurisdiction with the real defendants, and does not in effect range itself in opposition to the relief sought.

12. The decision of the Court of Appeals is in conflict with the decision of this Court in *Wardell v. Railroad Company, 103 U.S. 651,* which holds that directors of a corporation can not, with respect to the same matters, act for themselves and for the corporation.

13. This is the first occasion that there has been presented to this court for decision the question as to whether or not the injured corporation, in a stockholders' derivative action to enforce its rights against its majority directors arising out of their fraudulent breaches of trust toward it, may take a position which is fundamentally antagonistic to the claims asserted on its behalf.

14. The decision of the Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this Court.

SUPPORTING BRIEF

I.

THE WEIGHT OF AUTHORITY OF FEDERAL DECISIONS WHICH HAVE DEALT WITH STOCKHOLDERS' DERIVATIVE ACTIONS TO ENFORCE A CORPORATION'S RIGHTS AGAINST ITS MAJORITY DIRECTORS FOR FRAUDULENT BREACHES OF TRUST TOWARD IT, HOLD:

(a) WITH RESPECT TO THE CONTROVERSY PRESENTED, THE CORPORATION IS ON ONE SIDE, AND THE WRONGDOERS ARE ON THE OTHER;

(b) THE CORPORATION MUST BE REALIGNED AS A COMPLAINANT FOR THE PURPOSE OF DETERMINING DIVERSITY JURISDICTION.

The complaint in this stockholders' derivative action seeks to do exactly what the corporation itself might have done had it been free and competent to act for itself, i.e., to enforce the corporation's causes of action against its majority directors who conspired among themselves and with third persons to defraud it, in violation of their fiduciary duties to it. The complaining stockholder does not state any individual cause of action against her corporation or any defendant, nor does she seek individual relief against any of them.

Jurisdiction is invoked upon the ground of the amount involved and the diversity of citizenship existing between the parties to the controversy.

Jurisdiction is conferred upon federal courts by the *Constitution, Art. III, Section 2,* and upon district courts by Congress in *Section 1332, Title 28, U.S.C.,* "of *controversies* between citizens of different States."

Where, as here, the complaint in a civil action filed in a district court presents a matter in controversy which exceeds

the value stated in *Section 1332, supra,* and which is between citizens of different States, the district court has jurisdiction. Other parties being upon the record does not defeat jurisdiction in such case. There is no mention of "plaintiff" or "defendant" in the statute conferring diversity jurisdiction upon district courts. The actual parties to the dispute in this action are Crescent, a citizen of Maine, on one side, and those whose acts are complained of, all whom are citizens of states other than Maine, on the other; — hence, diversity exists between the parties to the controversy.

The two lower courts concurred in the view that such a controversy, when presented to the court through the medium of a stockholders' derivative action, is converted into one between the complaining stockholder, on one side, and the injured corporation and its wrongdoers on the other, because the corporation is in antagonistic hands. (R.399).

The weight of Federal decisions, in such cases, holds that the injured corporation must be realigned as a complainant, where its interest lies:

> *Arapahoe County v. Kansas Pacific Ry. Co., (1877), Fed. Cas. No. 502, 4 Dill. 277,* (Opinion by Mr. Justice Miller of the Supreme Court, sitting in Circuit); *Lamb v. Parrott Silver & Copper Co., (CC, 1901), 112 Fed. 241; Lucas v. Millican, (CC, 1905), 139 Fed. 816;* and *Laughner v. Schell, (CCA3, 1919), 260 Fed. 396.*

A stockholders' bill, naming their corporation as a defendant, may be brought solely in the rights of the stockholders; or, solely in the right of their corporation; or such bill may combine a right of action existing in themselves against their corporation and others with a right of action existing in their corporation against third persons. When brought *solely* in the right of the corporation it is a stockholders' derivative action. The rule for determining the diversity jurisdiction of federal

courts in each type of bill is different. *Johnson v. Brandon Corp., (CA 4) 183 F. (2d) 445.*

Petitioners earnestly urge that where the stockholders' bill, as here, declares only upon their corporation's right of action against other defendants, including a majority of its directors who are guilty of fraudulent breaches of trust toward their corporation, and the corporation's interest is in no way adverse to the success of the action, the corporation must be realigned as a complainant. The right of action thus declared upon is entirely derivative.

The basis of the decisions of the two lower courts in this case was;—that it was not the duty of Federal courts to realign the injured corporation in such cases because it was in antagonistic hands. Cited as controlling authority for this view are

> *Dodge v. Woolsey, 59 U.S. 9, 18 How. 331; Doctor v. Harrington, 196 U.S. 579; Venner v. Great Northern Railway, 209 U.S. 24; Koster v. Lumbermen's Mutual Casualty Co., 330 U.S. 518; Harris v. Brown, et al., 6 F. (2d) 922; Nagle v. Wyoga Gas & Oil Corp., et al., 10 F. Supp. 905; Kelly v. Queeney, 41 F. Supp. 1015; Smallen v. Louisville Fire & Marine Insurance Co., 80 F. Supp. 279; J.R.A. Corporation v. Boylan, et al., 30 F. Supp. 393,* affirmed on opinion below, *109 F. (2d) 1018; Tachna v. Insuranshares Corporation of Delaware, 25 F. Supp. 541,* and *Lavin v. Lavin, 182 F. (2d) 870.*

Petitioners contend that none of the decisions so cited, when consideration is had for the facts in each case and the law as applied thereto, authorize federal courts to refuse to realign the injured corporation as a complainant in a stockholders' derivative action because it is in antagonistic hands—when its interest is not adverse to the success of the action.

A.

This Court has not authorized an exception in stockholders' derivative action to the rule which obligates Federal Courts to realign parties for jurisdictional purposes according to their real interests.

The Court of Appeals approved the stated authorities as sustaining an exception to the rule of realignment in its decision of the appeal in the case of *Tucker v. New Orleans Laundries, 90 F. Supp. 290,* and held that its decision in this case was controlled by its decision in that case, decided the same day.

This Court, in *Removal Cases, 100 U.S. 457,* held that the Act of March 3, 1875 (18 Stat. part 3, 470), requires the realignment of parties in removal cases for jurisdictional purposes. This Court held said Act to require the same in original actions in *Pacific R.R. v. Ketchum, 101 U.S. 289.*

Dodge v. Woolsey, supra, was decided in 1855, twenty years before the courts were required to realign parties, hence that case furnishes no support for the decision below.

Contrary to the misinterpretation placed by the lower courts upon the decision of this Court in *Doctor v. Harrington, supra,* that case was *not* a stockholders' derivative action. The two stockholders in that case sued *in their own rights,* and *not exclusively in the right of their corporation,* the Sol Sayles Company. This misinterpretation has doubtless been due to the fact that the opinion of this Court did not fully disclose all the allegations of the complaint and the relief which was sought. Such misinterpretation is also the result of the tendency of the lower courts to give undeserved weight to the words:

> "but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights."

Antagonistic control of the corporation is at the root of every stockholders' bill against his corporation;—both when he sues it to enforce a right of his own against it, as well as where he makes it a nominal defendant, in a derivative action, to enforce its cause of action against others.

In attaching unwarranted significance to the above quoted language of the opinion, the lower courts have disregarded the language of this Court which was the real basis of its decision in *Doctor v. Harrington, supra,* to-wit:

> "If a controversy hence arises, and the other conditions of jurisdiction exist, it can be litigated in a Federal court."

The only basis upon which this Court could have upheld diversity jurisdiction in *Doctor v. Harrington, supra,* was that a controversy involving the requisite amount actually existed between the complaining stockholders, who were citizens of New Jersey, and their corporation and the other defendants, all of whom were citizens of New York;—hence, one between citizens of different states. This was the basis of its decision. Its refusal to realign the corporation as complainant was because the stockholders were suing to enforce their personal rights against it. *The principal purpose of the suit was to divest the Sol Sayles Company, of which complainants were stockholders, of its title to all of its property and to vest the title thereto in complainants and its other stockholders.* Complainants sought an accounting from the corporation and the distribution to its stockholders of—all of its property; and further sought to recover from certain directors specific property in their hands which it was claimed belonged to the corporation, the latter, if recovered, to be distributed to all stockholders along with the other assets of

the corporation. As it appears of file in this Court, the Eighth, Twelfth and Twenty-second paragraphs, together with the demands for relief in the complaint, clearly show:

(1) That the stockholder-complainants demanded an accounting from their corporation, the Sol Sayles Company, and that all of its property when accounted for be distributed to its stockholders.

(2) That the corporation's property consisted of accounts, bills receivable and other assets of great value due the corporation direct and in addition, the assets sought to be recovered for the benefit of the corporation from its directors.

(3) That the granting of the relief prayed for against their corporation would have stripped it of all of its assets—and left it an empty shell.

Clearly—then, *Doctor v. Harrington, supra,* cannot be regarded as authority for sanctioning the refusal of a federal court to realign the injured corporation in a stockholders' derivative action as a complainant because it is in antagonistic hands, where, as here, the injured corporation's interest is not in any way adverse to the success of the action.

The reference to *Doctor v. Harrington, supra,* in *Koster v. Lumbermen's, supra,* does not change the law as it was actually applied and intended to apply in the former case. The only question presented to this Court for decision in the *Koster Case, supra,* was the application of the doctrine of *forum non conveniens* in a derivative action. The issue was raised by the *injured corporation.* It was the only question decided in the majority opinion.

In one of the dissenting opinions in *Koster v. Lumbermen's, supra,* Mr. Justice Reed, concurred in by Mr. Justice Burton—on page 534 of 330 U.S., said:

> "We need not tarry to consider the small interest of the plaintiff in the assets of his corporation, nor the effect of realigning the corporation on the side of the cause where its true interest lies. However interesting the implications of these facts, they have nothing to do with a dismissal on the ground of the inconvenience of the forum. The same facts would exist no matter what the forum, and they are accordingly not pertinent to our inquiry."

It is unmistakable from the foregoing that this Court, as a whole, was not concerned with the doctrine of the realignment of parties in derivative actions in *Koster v. Lumbermen's, supra,* and that it gave no serious consideration to the basis of its ruling in *Doctor v. Harrington, supra.*

The only other case to come before this Court after *Doctor v. Harrington, supra,* where the question presented and decided, was the realignment of parties in a stockholders' bill is the case of *Venner v. Great Northern Ry. Co., 209 U.S. 24,* decided in 1908. This Court held:

> "in an action against the corporation and others by one of the stockholders, that where the complaint alleges *joint* fraudulent conduct on the part of the corporation and other defendants with whom it *jointly* resists that charge, the corporation cannot be realigned as a party plaintiff even if it might be to its financial interest to have plaintiff prevail." (Emphasis supplied)

Venner v. Great Northern, supra, also decided, adversely to *De Neufville v. New York & Northern Ry. Co.*, 81 *F.* 10, that equity rule 94 does not affect Federal jurisdiction. Rule 23(b) of the Federal Rules of Civil Procedure is the successor to equity rule 94. Rule 82 F.R.C.P. expressly provides:

> "These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein."

In *Hamer v. New York Railways Co., (1917), 244 U.S. 266,* a case involving the proper realignment of a trustee

made defendant in a suit brought by beneficiaries in the right of the trustee, upon the refusal of the trustee to sue, this Court said at page 274:

> "It is not contended that this refusal to sue makes the Trust Company an adversary, to be classed for purposes of jurisdiction with the real defendants,—as in those cases where the refusal to sue was part of a fraudulent participation in the wrongdoing, and where the trustee or corporation in effect ranged itself in opposition to the relief sought.[3] The Trust Company having, as we have shown, a real interest in the controversy, which makes it a necessary party to the suit, must be aligned as a party plaintiff, where its interest lies.[4]"
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> * * * * *
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> "3. Venner v. Gt. N. R. Co., 209 U.S. 24; Doc. v. Harrington, 196 U.S. 579; Kelly v. River Coaling Co., 172 Fed. 482; Groel v. United El. Co., 132 Fed. 252.
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> "4. Blalock v. Small, 127 U.S. 96; Harter v. Kernochen, 103 U.S. 562; Pac. R. Co. v. Ketchum, 101 U.S. 289; Allen-West Commission Co. v. Brashear, 176 Fed. 110; Shipp v. Williams, 10 CCA 247."
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> * * * * *

It appears that this Court, in the *Hamer Case, supra,* apparently considered the rule as to realignment of parties to be the same in actions by stockholders on behalf of their corporations, as in actions by beneficiaries in the right of trustees, and not different from the rule in other civil actions. That is, for purposes of determining diversity jurisdiction the parties must be realigned according to their real interests in the controversy.

There has been no decision of this Court since the *Hamer Case, supra,* in which the question of the realignment of parties in derivative actions has been directly presented and decided.

In *City of Indianapolis v. Chase National Bank, supra,* at pages 69 and 70 of 314 U.S., this Court said:

> "It is our duty, as it is that of the lower federal courts, to 'look beyond the pleadings and arrange the parties according to their sides in the dispute.' *** Litigation is the pursuit of practical ends not a game of chess. *** Whether the necessary 'collision of interest' exists is therefore not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit' and the 'primary and controlling matter in dispute.' These familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship have consistently guided the lower federal courts and this court."

Doctor v. Harrington, supra, and Venner v. Great N. R. Co., supra, were cited in support of the doctrine so announced, without qualification.

There is no conflict between the majority and minority opinions of this Court upon the doctrine of realignment, as applied to a nominal defendant, which was precisely stated in the minority opinion in *Indianapolis v. Chase, supra, at page 80 of 314 U.S.*, as follows:

> "The doctrine of realignment permits and requires a nominal defendant to be treated as a plaintiff for the purpose of defining the real controversy where no real cause of action is asserted against him by the plaintiff, but it does not admit of such treatment of a defendant against whom the plaintiff asserts a cause of action within the jurisdiction of the court."

B.

The decisions of other lower Federal Courts cited as authority did not authorize an exception, in stockholders' derivative action, to the rule which obligates Federal Courts to realign parties for jurisdictional purposes according to their real interests.

The following decisions—cited in the opinion of the District Court in the case of Tucker v. New Orleans Laundries,

supra, as sustaining an exception to the rule of realignment, in stockholders' derivative actions, are not in point:

The court, speaking of the rule of realignment in *Harris v. Brown, supra,* at page 924, said:

> "This rule, however, has never been invoked in stockholders' bills; if so, it would be impossible for a nonresident stockholder to ever bring a stockholders' bill in the federal court, no matter how flagrantly the officers of the company were violating their duty to the corporation and its stockholders."

The stockholder was suing in his own right to enjoin certain persons from acting as directors of his corporation. Hence, the ruling had no application in a stockholders' derivative action.

Nagle v. Wyoga Oil & Gas Corp., supra, was a case where the plaintiff stockholders were parties to the controversy in their own right. They sought the appointment of a receiver for their corporation.

Kelly v. Queeney, supra, was not a stockholders' bill, and no ruling in that case is applicable in this action.

In *Smallen v. Louisville Fire & Marine Insurance Co., supra,* the refusal to realign the corporation as a complainant was based upon the decision of this Court in *Venner v. Great Northern Ry. Co., supra,* in that, the corporation and the directors were alleged to have engaged in the same illegal and fraudulent conduct, and the injury was alleged to have been accomplished by their joint action.

J.R.A. Corporation v. Boylan, supra, was an action brought in the personal right of the stockholders. The corporation, The American Tobacco Company, was charged with violating its charter and by-laws in adopting illegal stock purchase and bonus plans, which the stockholder, suing in his own right, claimed to be entitled to have set aside.

Tachna v. Insuranshares Corp., supra, is not authority for the exception invoked. This point was not before the court for decision. The only question before the court in that case was an application of Massachusetts stockholders to intervene. The court had original jurisdiction of the case as it stood—which could not have been ousted because of the citizenship of persons whom the court might permit to intervene as held in *Stewart v. Dunham, 151 U.S. 61.* What the court said, in speculating as to what its jurisdiction might have been—had the suit been otherwise brought, was pure obiter dicta.

Lavin v. Lavin, supra, cited by the Court of Appeals, does not sustain the exception. The facts set forth in the *Lavin Case, supra,* do not show the nature of the allegations made against the corporation and the relief demanded against it. However, the record in the case in the Court of Appeals for the Second Circuit—discloses that the non-derivative relief demanded against the stockholder's corporation by the stockholder was as follows:

> "(2) cancellation of a burdensome management agreement imposed by the individual defendants upon the corporation (fols. 25-38);
>
> (6) cancellation of an improvident and burdensome long-term lease made by the corporation in fraud of plaintiff's rights and in violation of Sec. 20 of the Stock Corporation Law (fols. 64-73);
>
> (7) appointment of a receiver for Sanford Hotel Corporation to bring suit to cancel and set aside leases and agreements referred to in (6); and
>
> (8) that defendants be required to declare and pay dividends on plaintiff's shares of stock. (fol. 78)"

In his opinion in the *Lavin Case, supra,* Chief Judge Learned Hand said:

> "It may indeed be doubted whether as an original question the Supreme Court would not today align the corporation as a party plaintiff in all cases;[3] nevertheless

it has shown no disposition to change the rule in Doctor v. Harrington 196 U.S. 579, 25 S.Ct. 355, 49 L. Ed. 606, but has recognized its continuing authority."

* * * * *

"3. Koster v. American Lumbermen's Mutual Casualty Co., 330 U.S. 518, 522, 533, 67 S. Ct. 828, 91 L. Ed. 1067."

* * * * *

The plaintiff stockholder and his corporation were both citizens of the State of New York in the *Lavin Case, supra.* The stockholder having alleged an individual cause of action against his corporation and demanded relief against it, thereby making it an adversary, the court properly held that there was a lack of diversity jurisdiction.

The cases cited by the lower courts are authority only for the proposition that, where a stockholder's bill alleges an individual cause of action against his corporation and demands relief against it, the corporation must be treated as a real defendant. None of them are authority for the proposition that the corporation, made a nominal defendant in a stockholders' derivative action, shall not be realigned as a complainant when its interest is not adverse to the success of the action.

C.

Decisions which have held that the general rule of realignment does not apply in stockholders' derivative actions, including the decision of the Court of Appeals in this case, are unsound, and in conflict with the decisions of this Court.

A review of the decisions of lower federal courts, which have held that the general rule of realignment is inapplicable in stockholders' derivative actions, shows that the reasons assigned for such holdings have been immature reflections,

and wholy untenable, in addition to being in conflict with the principles of law and equity, and contrary to the decisions of this Court.

De Neufville v. New York & Northern Ry. Co., supra, was a stockholders' derivative action apparently similar to this one. The court held that the real controversy was *between the corporation and those who deprived it of its property,* but, also held that the corporation could *not* be realigned as complainant because, as it said at page 13:

> "the decisions in Dodge v. Woolsey, 18 How. 331, Hawes v. Oakland, supra, (104 U.S. 450), and Quincy v. Steel, 120 U.S. 271, 7 S.Ct., 520, and the ninety-fourth rule in equity, seem to preclude a strict application, in cases such as the one at bar, of the rule that parties may be rearranged according to interest in the controversy." (Parenthesis ours)

Groel v. United Electric Co., (CC N.J., 1904), 132 F. 252 was a stockholders' derivative action similar to this one. In that case, at pages 261 and 262, the court, in our opinion, clearly demonstrated the fallacy of the reasons stated by the Circuit Court of Appeals in the *De Neufville Case, supra,* for refusing to realign the injured corporation as complainant in that case. However, after reviewing many authorities, including the decisions of this Court in *Greenwood v. Freight Co., 105 U.S. 13, New Jersey Central R. Co., v. Mills, 113 U.S. 249,* and *East Tennessee, etc., R. R. v. Grayson, 119 U.S. 240,* the court announced its view at pages 263 and 264 as follows:

> "The rule deduced from them is that, in a suit in equity instituted by a stockholder in his own name, but upon a right of action existing in his corporation, the stockholder's corporation will be aligned with the defendants whenever the officers or persons controlling the corporation are opposed to the object sought by the complaining stockholder, and that, when such opposition

> does not appear, the stockholder's corporation will be aligned with the complainants in the case. It may not be easy to bring the Arapahoe County Case and a few others into line with this rule. But it is believed that the cases decided by the Supreme Court involving the duty of classifying parties for the purpose of determining the question of the jurisdiction of the Circuit Courts of the United States have established this rule."

Petitioners contend that nothing contained in the three preceding cases cited from this Court authorized such a deduction. The lower court in the *Groel Case, supra,* must have thought that this Court had held the corporation to be a real defendant in each of these three cases because, as it stated at page 262, these three decisions supported the principle that:

> "as a corporation can act only through its authorized agents, the position assumed in a controversy by such agents must necessarily fix the position of the corporation."

It does not appear that the principle announced was in the minds of the Supreme Court when it decided either of these three cases, or that such cases authorize the application of the stated principle to the facts of this case.

The defect in the court's deduction in *Groel v. United El. Co., supra,* is that it entirely overlooked the fact that not a single one of the three cases here decided dealt with a stockholders' derivative action. Each was brought in the right of the suing stockholder, and not in the right of his corporation. In *Greenwood v. Freight Co., supra,* the stockholder sought an injunction against his corporation to prevent it from complying with a statute claimed to be unconstitutional. The corporation was a real defendant against whom relief was sought. In *New Jersey Central R. Co., v. Mills, supra,* the stockholder's corporation *united with other defendants* in defending the acts complained of, and in denying the charges of illegality and fraud made against all the defendants, and sought

to uphold a lease, to which it was a party, and which the stockholder sought to have adjudged invalid. Again the stockholder was suing in his own right and not in the right of his corporation. In *East Tennessee, etc., R.R. v. Grayson, supra,* the allegations of the bill were said by this Court to be to the effect that the stockholder's corporation was acting in harmony with another corporation to uphold the validity of a lease which was sought to be cancelled, and this court said that these allegations of the bill were the equivalent of the *joint answer* in *New Jersey Cen. R. Co. v. Mills, supra,* for the purpose of fixing the position of the corporation as a real defendant. In *East Tennessee, etc., R.R. v. Grayson, supra,* this Court said, at page 244 of 119 U.S.:

> "The principal purpose of the suit is to set aside the lease for want of authority to make it. For that purpose both the lessor and lessee are necessary parties. *Grayson is not suing for the Memphis & Charleston Company but for himself.* It is true a decree in his favor may be for the advantage of the Memphis & Charleston Company, but he does not represent the company in its corporate capacity, and has no authority to do so." (Emphasis supplied)

It thus seems clear that the reasons which were assigned by the court in *Groel v. United Electric Co., supra,* for its refusal to realign the injured corporation as complainant in that stockholders' derivative action, had no support in the cited decisions of this Court.

Doctor v. Harrington, supra, was next decided in 1905—and the exception is now sought to be justified, because the corporation is in antagonistic hands. Petitioners submit that this fact does not create a controversy between the stockholder and his corporation, or between the stockholder and those who wronged his corporation.

In *Hawes v. Oakland,* supra, this Court said a cause of action arose in favor of the stockholder against his corpo-

ration, where he made a demand upon it to sue *outsiders* upon a cause of action existing in its favor, and it refused to do so. This Court has never held that a cause of action arose in favor of the stockholder against his corporation or against its wrongdoers, where the stockholder made no demand upon the corporation to sue its majority directors for fraudulent breaches of trust to it.

The facts in this case, with respect to a demand upon the corporation to sue, are distinguishable from those in *Doctor v. Harrington, supra,* and *Venner v. Great Northern Ry. Co., supra.* Here no demand was made because it would have been futile. (R. 225). There was no refusal on the part of Crescent to sue in this case which could be deemed a fraudulent participation in the wrongdoing, as this Court, in *Hamer v. New York Railways Co., supra,* characterized the refusal of the corporation to sue in *Doctor v. Harrington, supra,* and *Venner v. Great Northern Ry Co., supra.*

This case is further distinguishable from the two last cited cases, in that, the cause of action declared upon here is one upon which Crescent itself might have sued the other defendants in a federal court, diversity existing between them; whereas, the cause of action in favor of the corporation in each of the other cases could not have been prosecuted by the corporation in the federal courts because the corporation and its wrongdoers were citizens of the same State. The federal courts assumed jurisdiction in *Doctor v. Harrington, supra,* and *Venner v. Great Northern Ry. Co., supra,* because the complaint in each of these cases stated an individual cause of action between the stockholder and his corporation, and they were citizens of different States.

D.

The rule of undivided loyalty of agent to principal forbids agent to be personally interested adversely to the rights of his principal. When that antagonism arises, the law terminates the agency. This rule is applicable to directors as agents of a corporation. This Court has not sanctioned a departure from this rule in stockholders' derivative actions.

In *Temmen v. Courtney, 1 S.W. 875, 877, 8 Ky. L. 921,* cited in *3 Corpus Juris Secundum, p. 138, Verbo Agency,* it is said:

> "An agent, whether general or special, must be faithful and disinterested in the management of his principal's business. He must not be personally interested adversely to the rights of his principal. 'When that antagonism arises, the law terminates the agency.' "

This salutary principle, so well stated, has been held to apply to officers and directors of corporations, who are regarded in courts of equity as trustees, where they purport to act as agents for their corporation in the sale of its assets and sell to themselves to its injury. *Commonwealth Finance Corp. v. McHarg, (CCA2) 282 F. 569.*

Such are the facts in this case as stated in the bill of complaint. (R. 24-101).

From the moment when each of Crescent's majority directors joined in the fraudulent conspiracy to divert to themselves assets used by it in its linen supply business, an antagonism arose between said agents and their principal. This principle of law vacated the directorship agencies with respect to their representation of the corporation in dealing with the corporation's claims for the recovery of those assets. Had the question of the advisability of bringing suit against

said directors been presented at a meeting of the Board of Directors, each of said majority directors would have been disqualified from voting on the question, *Anderson v. Gailey, 33 F. (2d) 589*, citing *10 Cyc. 790*. Nor could a majority of the stockholders have ratified their acts after this action was instituted. *Klein v. Independent Brewing Ass'n., 231 Ill. 594, 83 N.E. 434, 451.*

These majority directors have remained in office and they and their confederates continuously controlled a majority of the corporation's stock. They are disqualified to represent the corporation in the negotiation of a settlement of, or in the litigation of, its claims against themselves. Their personal antagonism to a demand that they account to the corporation in this stockholders' derivative action, should not fix the corporation's position as being unfriendly to the enforcement of the claims asserted on its behalf herein. Such antagonism is dictated by their own personal interests, rather than being impelled by the discharge of their duty of undivided loyalty to their principal. *Camden Land Co. v. Lewis, 101 Me. 78, 63 A. 523, 534.*

In *Wood v. City National Bank & Trust Co., 312 U.S. 262, 269*, this Court approved the principle stated by Judge Cardozo, later Justice of this Court, as set out in *Meinhard v. Salmon, 249 N.Y. 458, 465*, where he said:

> "Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. *** Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not be consciously lowered by this court."

This Court, as we have shown, has not yet consciously sanctioned the "disintegrating erosion" of the exception to the rule of realignment invoked by the District Court and sanc-

tioned by the Court of Appeals in this case, and petitioners urge that this Court now disavow the holding of the Court of Appeals to the contrary.

E.

A corporation's position can not be fixed as having approved fraudulent breaches of trust by its directors, except upon an unanimous vote of its stockholders. Its directors can not ratify their fraud against the corporation on its behalf, where they do not own all of its stock.

It would be an absurd paradox in the name of equity and justice, to permit the status of a corporation, having claims against its unfaithful directors for fraudulent breaches of trust toward it, to be fixed by the antagonistic attitude of the same directors who betrayed their fiduciary duties to it—in subservience to their individual interests.

Crescent, being a corporation of the State of Maine, the laws of the State of Maine govern the relationship between the corporation and its directors and stockholders. *Zahn v. Transamerica Corporation (CCA 3) 162 F. (2d) 36 (3).*

The Supreme Court of the State of Maine, in Bates *Street Shirt Co. v. Waite, (Me.) 156 Atl. 293, 297,* said:

> "Directors have no authority to act for the corporation in matters in which they are personally interested. They owe their whole duty to the corporation, and they are not to be permitted to act when duty conflicts with interest. They cannot serve themselves and the corporation at the same time. European & N.A. Ry. Co. v. Poor, 59 Me. 277."

The decision of the Court of Appeals, in sanctioning the doctrine that the rule of realignment is inapplicable in a stockholders' derivative action—under the facts in this case, places the corporation in a position in which the law does not permit it to be placed; and also in a position in which, if the

majority of the directors and stockholders had attempted to place it, thereby attempting to ratify their acts on behalf of the corporation, a court of equity would have denounced their action as a wanton or fraudulent destruction of the rights of the minority stockholders and the corporation. *Camden Land Co. v. Lewis, supra.*

As said by the court in *Dana v. Morgan, 219 F. 313, 315:*

> "Fraud is incapable of condonation even by the largest majority of shareholders, short of universal concurrence."

To the same effect: *Meeker v. Winthrop Iron Co., 17 F. 48; Hodgman v. Atlantic Ref. Co., 300 F. 590, 599; Cook, Corporations, 8th Ed. Sec. 730; Fletcher, CYC. of Corp., Sec. 5795.*

The courts can not, in the name of equity and justice, presume that a corporation occupies a position with respect to a controversy, which the law, the principles of equity, and public policy, all forbid it to occupy.

This Court, in *Wardell v. Railroad Company, 103 U.S. 651,* held:

> "The directors of a corporation are subject to the obligations which the law imposes upon trustees and agents. They cannot, therefore, with respect to the same matters, act for themselves and for it, nor occupy a position in conflict with its interests."

That decision has been many times cited, universally followed, and never overruled.

II.

THE COMPLAINING STOCKHOLDER IN A STOCKHOLDER'S DERIVATIVE ACTION SHOULD BE REGARDED AS A NOMINAL PARTY WHOSE CITIZENSHIP IS IMMATERIAL IN DETERMINING DIVERSITY JURISDICTION.

The stockholders' derivative action is an anomaly in the law. It is one to enforce a cause of action which the corpora-

tion itself might have sued to enforce, if unfettered, but must be unmixed with any cause of action which the complaining stockholder might have individually.

The position which the complaining stockholder occupies in a stockholders' derivative action has, by analogy, been defined in many different ways by the courts.

In *Koster v. Lumbermen's, supra,* this Court said:

> "The cause of action which such a plaintiff brings before the court is not his own, but the corporation's. It is the real party in interest and he is allowed to act in protection of its interest, somewhat as a 'next friend' might do for an individual because it is disabled from protecting itself."

In "next friend" suits in federal courts, it has always been held that it is the citizenship of the "infant" and not that of the "next friend" which determines diversity for the purpose of federal jurisdiction.

Voss v. Neineber, 68 F 947;
Blumenthal v. Craig, (CCA) 81 F. 320

In *Kohler v. McClellan, (D.C. La.) 77 F. Supp. 308, 314,* the court classifies the stockholder as a "nominal plaintiff"; *Denike v. Anglo California Nat. Bank, (CCA 9) 145 F. (2d) 285, 289 (4, 5)* assimilates his position to that of a "guardian ad litem"; *Chaplin v. Selznick, 293 N.Y. 529, 532, 58 N. E. (2d) 719, 720,* classifies him as "the nominal plaintiff *** the instigator" of the action. *Pomeroy on Equity Jurisprudence, 4th, Ed. 1095,* says the stockholder:

> "is permitted to sue in this way simply in order to set in motion the judicial machinery of the court."

The plaintiff-stockholder in a stockholders' derivative action is at most only a nominal plaintiff. He has no direct interest in the controversy different from that of all of the stockholders. The cause of action belongs to the corporate

body and not to the plaintiff and other stockholders individually, not even to the body of stockholders collectively. The judgment inures to the corporation as a separate entity, and all consequential benefits belong to all its stockholders.

Section 567, verbo Corporation, 18 Corpus Juris Secundum, p. 1288, in part, reads:

> "A suit by a stockholder on behalf of the corporation must be brought in equity. The suit is for the benefit of the corporation and all stockholders, and the real controversy is between the corporation and the persons whose acts are complained of, the corporation being the beneficial plaintiff."

The decision of the Court of Appeals is in conflict with the decision of this Court in *Stewart v. B. & O. Railroad Co., 168 U.S. 445, 459,* an action brought for the benefit of another, where this Court held:

> "For purposes of jurisdiction in the Federal courts regard is had to the real rather than to the nominal party."

The decision of the Court of Appeals is in direct conflict with the decision of this Court in *Bush v. Elliott, 202 U.S. 477,* which was a derivative action brought by plaintiffs as bankruptcy trustees in the Circuit Court for the Northern District of Alabama. One of the trustees was a citizen of Alabama and the two defendants were citizens of the same state. The bankrupt was a New Jersey corporate citizen. Diversity jurisdiction was upheld, because the trustees sued in the right of the bankrupt, whose citizenship was held to control upon the question of diversity. The statute involved was *Section 23(b) of the Bankruptcy Act as amended, Section 46(b), 11 U.S.C.A.* There is a more logical reason for holding in this action that the injured corporation's citizenship determines jurisdiction of the controversy here, than, that the bankrupt's citizenship controlled in *Bush v. Elliott, supra,*

where the legal title to the claims asserted on behalf of the bankrupt had vested in the trustees. The legal title to the claims asserted on behalf of Crescent are in Crescent, and have not vested in the stockholders, either individually or collectively.

In *Walden v. Skinner, 101 U.S. 577, 589,* this Court, citing *Arapahoe County v. Kansas Pacific Ry. Co., supra,* said;

> "Cases arise in the Federal courts in which nominal or even immaterial parties are joined, on the one side, or the other, with those who have the requisite citizenship to give the court jurisdiction of the case, and where that is so, the rule is that the mere fact that one or more of such parties reside in the same state with one of the actual parties to the controversy will not defeat the jurisdiction of the court."

Mrs. Tucker, the stockholder plaintiff, having no individual controversy with any of the named defendants, including Crescent ,and not being entitled to any individual relief—under the allegations of the complaint, her position is that of a nominal plaintiff, and her citizenship does not defeat the jurisdiction of federal courts of the controversy between citizens of different States set out in the complaint. The Court of Appeals erred in affirming the judgment of the District Court holding to the contrary.

III.

THE POSITION OF AN INJURED CORPORATION IN A STOCKHOLDERS' DERIVATIVE ACTION CAN NOT BE FIXED AS THAT OF A REAL DEFENDANT BECAUSE IT IS IN THE ANTAGONISTIC HANDS OF THE MAJORITY DIRECTORS AND STOCKHOLDERS WHOSE FRAUD IS THE ESSENCE OF THE ACTION.

Crescent, the injured corporation, filed no pleadings in this action. Irrespective of that fact, both lower courts held, in effect, that Crescent's position in the action was fixed as

being adverse to the enforcement of its own claims against its wrongdoers—because the wrongdoers were antagonistic.

Modern decisions, both Federal and State, are unanimous in holding that the injured corporation, in a stockholders' derivative action, can take no position which is fundamentally antagonistic to the claims asserted on its behalf, where fraud of the majority directors and stockholders is the essence of the stockholders' derivative action.

This question has not been, but should be, decided by this Court, since its decision is important to the jurisdiction of federal courts in wide areas of litigation.

In *Otis & Co., v. Pennsylvania R. Co (D. C. Pa.) 57 F. Supp. 680, 684,* the Court said:

> "The stockholders' action is critical of the corporation's management and the corporation should have a right to answer subject to the exceptions hereinbefore mentioned, where fraud of the directors or management is the essence of the stockholders' action."

In *Meyers v. Smith, (1933) 190 Minn. 157, 251 N. W. 20,* a stockholder sued, on behalf of his corporation, to recover money claimed to have been misappropriated by certain of its directors out of corporate funds. The corporation filed an answer containing affirmative defenses to the charges against its directors. In striking the corporation's answer, the court said (page 21 of 251 N. W.):

> "The corporation is a nominal party. It was properly joined as a party for the protection of the defendants, so that when final judgment is entered the two individual defendants may be thereby protected from a second suit on the same cause of action by the corporation. *** But that does not vest in the corporation the right to here step in and, by answer, attempt to defeat what is practically its own suit and cause of action."

Slutzker v. Reiber, (1942), 132 N. J. Eq. 412, 28 A. (2d) 258, is to the same effect, the court denominating the injured

corporation as a *formal* defendant, and the wrongdoers as *actual* defendants.

In *Chaplin v. Selznick, (1945), 58 N. Y. S. (2d) 453, the* injured corporation, United Artists, had associated itself with the defendant by denying the allegations of the complaint and asking for its dismissal. After reviewing many cases dealing with the theory of stockholders' derivative actions, both English and American, the court defined the position of the corporation on page 455, as follows:

> "*Here we must distinguish between the corporation as a separate entity and the management, of the corporation.* The management, the board of directors, may take a position antagonistic to a claim asserted on behalf of the corporation. That antagonistic position gives a stockholder the right to take the matter out of the hands of the management and to bring his action in a representative capacity on behalf of the corporation. *The corporation itself can take no position in a derivative stockholders' suit which is fundamentally antagonistic to the claim asserted on its behalf.* That is the whole theory which is behind a derivative stockholders' action." (Emphasis supplied)

If the injured corporation itself is forbidden by law and the principles of equity to take a position fundamentally antagonistic to the claims asserted on its behalf in a stockholders' derivative action, by what system of judicial legerdemain may such position be imputed to it?

The refusal of the lower courts to realign Crescent as a complainant in this action, where its interest lies and as required by law, was based upon the untenable position that it could not be so realigned because it was in antagonistic hands. This demands a reversal of the judgment of the Court of Appeals.

PUBLIC IMPORTANCE OF THE ISSUES.

The issues here involved are of great public importance, affecting as they do the jurisdictional integrity of federal courts in wide areas of litigation. The reports of federal decisions contain many cases involving frauds upon corporations by persons whose citizenship is diverse from the citizenship of the corporation, and which may be redressed only through the medium of a stockholders' derivative action in the federal courts.

The public policy of the United States as repeatedly expressed by this Court, as well as the public policy of all of the States, requires the faithful discharge of duties by persons holding positions of trust and confidence. Courts have ever been jealous to assert and enforce the public policy that no man can serve two masters by manipulating his position as trustee in his own interest. Whenever it has been made to appear that transactions have occurred in which a trustee was dealing with himself, the overwhelming majority of the courts have been intent on finding ways to defeat, rather than sustain, such transactions.

It is universally held that contracts and acts against such public policy cannot be made valid by ratification, and are illegal and void, as tending to be, or being, a fraud on third persons.

The Constitution confers jurisdiction upon federal courts of controversies between citizens of different States. Whenever such a controversy is presented to a district court above the amount specified by *Section 1332, supra,* and the parties to such controversy are properly before the court, it is the court's duty to assume jurisdiction. To correctly determine diversity jurisdiction, it is necessary for the court to decide the nature of controversy, and the citizenship of the parties to that controversy.

Until the decision of the Court of Appeals in this case, no appellate court in the United States had ever held that the controversy in a stockholders' derivative action, which complained solely of fradulent breaches of trust on the part of its corporate managers and majority stockholders, was other than a controversy between the injured corporation and such alleged wrongdoers.

The decision of the Court of Appeals below has sanctioned the holding by the District Court that the controversy in such an action is one between the plaintiff-stockholder, on one side, and the injured corporation and the wrongdoers on the other. Such decision is contrary to and in conflict with the decision of the Second Circuit in *De Neufville v. New York & Northern Ry Co., supra,* and the decision of the Third Circuit in *Laughter v. Schell, supra,* which hold that the controversy in such cases is one between the corporation and the alleged wrongdoers.

The two decisions last mentioned, however, are in conflict with each other, as to whether the rule obligating federal courts to realign the parties for jurisdictional purposes according to their real interests in the controversy, is applicable in a stockholders' derivative action. The decision from the Second Circuit decided the rule to be inapplicable, while the decision from the Third Circuit held it applicable.

The decision of the Court of Appeals below is in accord with the *De Neufville Case, supra,* that the rule of realignment is not applicable in stockholders' derivative actions. The reasons assigned by each court for this conclusion are entirely different. Each of these two decisions claim authority for this view in decisions of this Court, which do not, as we have shown, support it.

Under no stretch of the imagination may it truthfully be said that any adverse interest exists between the complaining stockholder and her corporation in the case at bar. Nor is

there any justiciable controversy alleged or existing between Mrs. Tucker and her co-citizens of Louisiana. The complaint alleges facts which entitle her to represent her corporation in the prosecution of its claims to the exclusion of its unfaithful corporate managers.

It is of vital public importance that the questions presented be finally decided by this Court because such decision will affect the jurisdictional integrity of Federal courts of controversies between citizens of different States. The decision of the Court of Appeals in this case furnishes corporate managers complete civil immunity from having to account to their corporation for fraudulent breaches of trust, where they and their corporation are citizens of different States, and where all of the corporation's stockholders are citizens of the same state as the corporate managers. In such instances there is no State tribunal where the injured foreign corporation and its local unfaithful managers, the actual parties to a controversy thus arising, may be compelled to appear, because the process of a State can not run beyond its boundaries. Where the requisite statutory amount is in controversy the Federal courts should not deny to a corporate citizen of one State who has been defrauded by citizens of another State, the right to have its property protected through a representative action in its courts.

A corporate citizen is entitled to the protection of its property against fraudulent misappropriation by its managers upon the same basis as the property rights of individual citizens are accorded protection under the law. It is entitled to be represented by its stockholders in the prosecution of suits to protect its property rights on its behalf, to the same extent as one individual might act for an infant, lunatic, or other helpless individual. The mere fact that it is placed as defendant instead of plaintiff in a suit in chancery, never changes its relation to the matter in controversy. *Arapahoe County Case, supra, p. 285.*

CONCLUSION

The Petition for Certiorari should be granted in order that this Court may review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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Richard A. Dowling,
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as a stockholder, on behalf of
Crescent City Laundries, Inc.
Petitioners.

20

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 211.

MRS. ODILE V. HUBERT TUCKER, as a Stockholder, On Behalf of Crescent City Laundries, Inc.,
Petitioner,

v.

NATIONAL LINEN SERVICE CORPORATION et al.,
Respondents.

BRIEF

On Behalf of Respondents, National Linen Service Corporation, I. M. Weinstein, J. B. Jacobs, and A. J. Weinberg, in Opposition to Petition for Certiorari.

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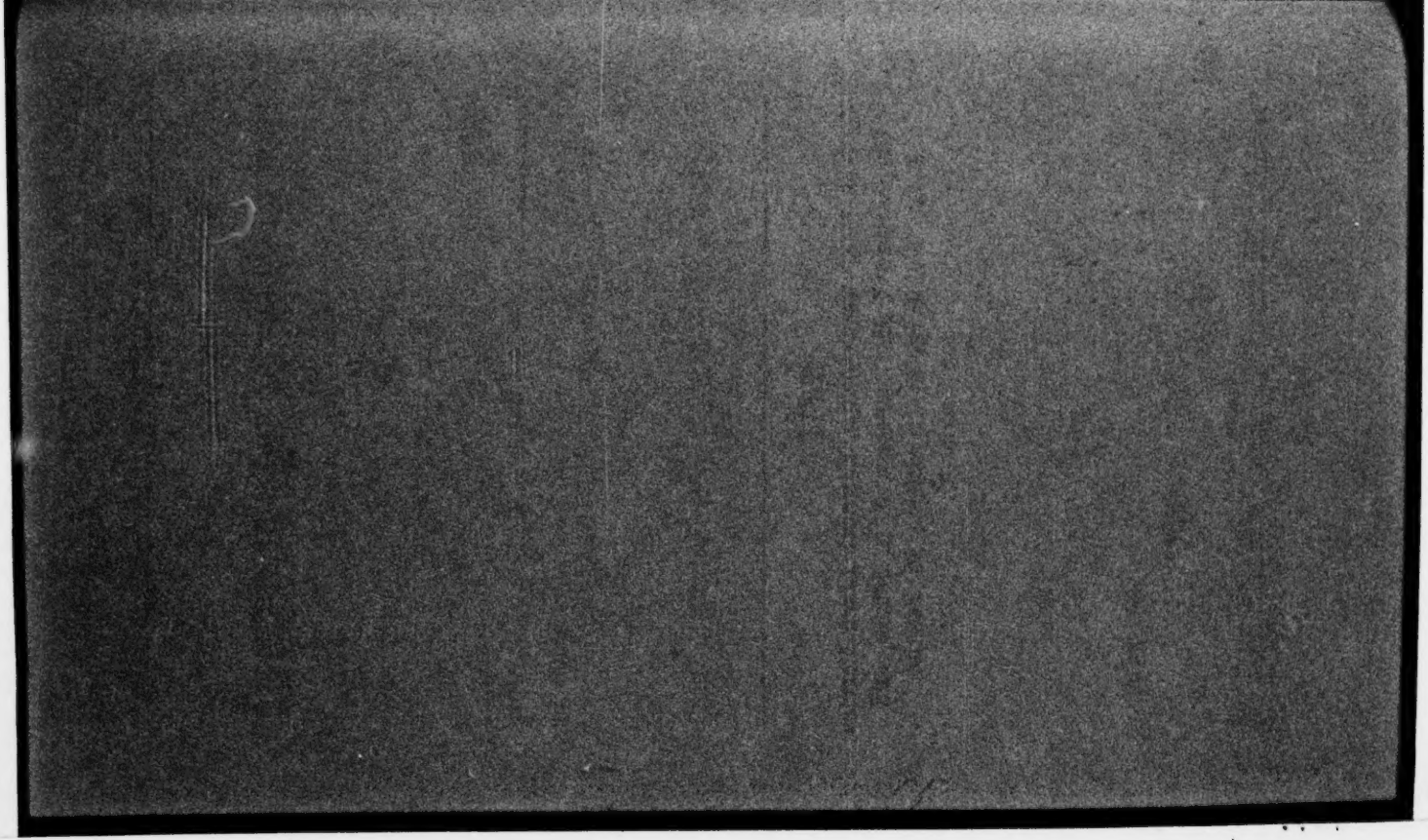

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IN THE

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v.

NATIONAL LINEN SERVICE CORPORATION et al.,
Respondents.

BRIEF

On Behalf of Respondents, National Linen Service Corporation, I. M. Weinstein, J. B. Jacobs, and A. J. Weinberg, in Opposition to Petition for Certiorari.

These respondents say the writ should not be granted, because:

1. There is no sufficient compliance with Rule 38.

2. The ruling below was correct.

3. The record affirmatively shows that the corporation in whose behalf the plaintiff stockholder sued had lost title to the cause of action sought to be asserted, so that a realignment of parties would not benefit the action.

STATEMENT OF FACTS.

Plaintiff, a citizen of Louisiana, a stockholder of Crescent City Laundries, Inc., a Maine corporation, sued in the Northern District of Georgia, citizens of Louisiana, Georgia, and other States, for wrongs alleged to have been done Crescent in the diversion of stock of National Linen Service Corporation in connection with the organization of that corporation in 1928, and for other wrongs to Crescent beginning in 1924 (Complaint, Par. 176 et seq., R. 110).

The complaint alleged (Par. 259-343, R. 139 et seq.) the sale of all the assets of Crescent at sheriff's sale in Louisiana in 1942. It attacks this sale as void because of the fraud of B. C. McClellan and others who are not parties here.[1]

The trial court dismissed on motion. The Circuit Court of Appeals affirmed. 188 F. 2d 265 (R. 418). At the same time the Circuit Court of Appeals affirmed the dismissal by the District Court, Eastern District of Louisiana, of another suit by plaintiff against many of the same defendants, asserting the same cause of action. **Tucker v. New Orleans Laundries, Inc.**, 188 F. 2d 263. Petition for certiorari is presented in that case also. No. 210.

---

1 McClellan's executors and certain other non-residents of Georgia were named as defendants, but were dismissed for want of valid service. That ruling is not attacked in this Court.

BRIEF AND ARGUMENT.

1. Petitioner has failed to comply with Rule 38, paragraph 2, which requires the presentation of a summary and short statement of the matter involved. In this Georgia case the petitioner's summary statement is a duplicate of that filed in the Louisiana case. There were differences in defendants and in motions. Here the trial court did not dismiss on diversity grounds alone, and the court must examine the record to determine the points involved. Thus the purpose of the rule is circumvented.

2. The decision below is correct. The opinion of the District Judge who heard the Louisiana case (**Tucker v. New Orleans Laundries,** 90 F. Supp. 290) and the opinion of Judge Learned Hand in Lavin v. Lavin, 182 F. 2d 270, deal so thoroughly with the questions sought to be made that, to borrow the language of the Court of Appeals in this case, "it would be a work of supererogation to redefine and redecide the issues so adequately defined and decided."

3. A decision in favor of plaintiff on the point she makes would not benefit her. That is so because Crescent has no title to the cause of action sought to be asserted.

Petitioner's contention here is that the court should be required to realign the parties so as to make Crescent, sued on as a defendant, the only plaintiff—or the only plaintiff whose citizenship would affect the question of diversity. She says this should be done, and the citizenship of the stockholder plaintiff disregarded, because (Petition, p. 30) "the legal title to the claims asserted on behalf of Crescent are in Crescent." In this contention petitioner falls into fundamental error. The foreclosure sale in Louisiana in 1942 divested Crescent of all title to the cause of action petitioner seeks to assert for its benefit. That was decided

in **Kohler v. McClellan,** 156 F. 2d 908. Certiorari denied, 329 U. S. 781, 91 L. ed. 670.[2]

There the Circuit Court of Appeals said (156 F. 2d, at p. 910):

> "The original and supplemental petition make it plain that on July 9, 1942, 'all the debtor's (Crescent's) choses in action and claims of any and every character against any and all persons whomsoever, whether or not shown upon the books of the debtors, and all of the debtor's cash, assets and effects of every name, character and description' were sold at public outcry by the civil sheriff of Orleans Parish, Louisiana, under a writ of fiere facias issued upon a money judgment against Crescent; that an attorney at law in New Orleans bought in the properties at the auction sale and transferred them to N. O. Laundries, Inc., a Louisiana corporation; **and that title to all the claims against the defendants except those against B. C. McClellan and associates[3] for their alleged fraudulent and illegal acts in connection with the sale passed to N. O. Laundries, Inc.**" (Emphasis supplied.)

The decision in **Kohler v. McClellan** conclusively holds that Crescent, in whose behalf the stockholder plaintiff here seeks to sue, has no title to the causes of action the stockholder plaintiff seeks to assert in Crescent's behalf.[4]

---

2 Kohler was a stockholder of Crescent. He lived in Mississippi, which was not the state of the residence of any defendant there sued. His action was a derivative one, and sought to recover, among other things, on account of "the transfer of stock in National Linen Service Corporation to certain of the defendants without consideration," exactly what is sued for here. Kohler v. McClellan, supra, 256 F. 2d 908, at 909, par. 8.

3 The one cause of action thus said to remain and to constitute a claim to which title did not pass by virtue of the sheriff's sale was against McClellan and his associates for allegedly wrecking Crescent and bringing about the sale of its property. This claim, it was held, was not sold at the sheriff's sale, but it was not sought to be asserted in the present suit against any defendant who remains in the present suit, and had nothing to do with the claim of Crescent for the alleged diversion of Nationl Linen stock in 1928.

4 Kohler v. McClellan also answers the contention of petitioner, elaborated at page 35 of her brief, that unless there is a reversal there is no venue in which the questions sought to be raised can be litigated, for they were there litigated in a venue of complete diversity.

It is not strange that the Circuit Court of Appeals said the litigation was being continued "in complete disregard of the judgment of this court in **Kohler v. McClellan.**"

If there is to be a review of cases which petitioner says stand in her way, it should be in a case where the principle she seeks to establish will have some bearing upon the case, not one in which neither the stockholder plaintiff nor the corporation has any right to sue anywhere.

The writ should be denied.

Respectfully submitted,

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IN THE

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No. 211.

MRS. ODILE V. HUBERT TUCKER, as a Stockholder, on behalf of CRESCENT CITY LAUNDRIES, INC.,
Petitioners,

vs.

NATIONAL LINEN SERVICE CORPORATION, *et al.*,
Respondents.

Brief in Opposition to Petition for a Writ of Certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

MRS. ODILE V. HUBERT TUCKER, as a Stockholder, on behalf of CRESCENT CITY LAUNDRIES, INC., *Petitioners,* vs. NATIONAL LINEN SERVICE CORPORATION, *et al.*, *Respondents.*	No. 211.

Brief in Opposition to Petition for a Writ of Certiorari.

Statement and Argument.

Plaintiff as a stockholder of Crescent City Laundries, Inc. petitions this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the record and judgment entered by that Court in this action on April 5, 1951.

The District Court dismissed this action because of a lack of diversity of citizenship (R. 400), a lack of indispensable parties (R. 402), and a lack of personal jurisdiction over the undersigned respondents none of whom are residents of Georgia or subject to service there (R. 403).

In the companion petition for a writ (No. 210), *Tucker, etc., Petitioner* v. *New Orleans Laundries, Inc., etc., Respondents,* we have submitted a brief of our argument in opposition to the petition in that case. Rather than bur-

den the Court with a repetition of this discussion, attention is respectfully directed to that brief on that application.

In addition to the argument there presented we desire to point out, in the event this Court should be disposed to grant a writ on the diversity question, that no valid purpose can be served in doing so with respect to the undersigned respondents.

Contending that this action was in rem "to enforce equitable lien upon and a claim to personal property within" the Northern District of Georgia, plaintiff made extra-territorial service on the undersigned respondents under Title 28 U. S. C. A., Sec. 1655 (R. 293-296, 231, 232). These respondents made timely objection to such service on the ground that extra-territorial service was ineffectual and that the Court had no jurisdiction over them since they had no real or personal property in Georgia and the action was in personam (R. 305, 306, 308-310).

The District Court held that the action "is in personam, since it seeks only the recovery of personal judgments * * * " (R. 397), and after discussing diversity of citizenship, the District Court dismissed the action not only because of a lack of diversity (R. 400) and a lack of indispensable parties (R. 402) but also because the attempted extra-territorial service upon these non-resident respondents "is bad, and their motions to quash should be sustained" (R. 403), since "plaintiff has no lien and, as has been seen, the action is not one in rem" (R. 403); and in support of its conclusions in this regard, the District Court relied upon the decisions in *McQuillen* v. *Dillon, et al.*, 2 Cir. 1938, 98 F. 2d 726, cert. den. 305 U. S. 655, and *McQuillen* v. *National Cash Register Co.*, 4 Cir., 1940, 112 F. 2d 877, cert. den. 311 U. S. 695, reh. den. 311 U. S. 729.

While the Court of Appeals in its affirmance only considered the diversity issue, that being "dispositive of the case" (R. 419), the fact remains that these respondents

are not within the jurisdiction of the United States Court for the Northern District of Georgia. As a consequence they should not, in this action, be put to the burden of participating in the determination of questions which to them are purely academic and moot.

CONCLUSION.

The Petition Should Be Denied.

Respectfully submitted,

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Certificate as to Service.

I, the undersigned, do hereby certify that I have this day served a copy of the foregoing brief on each of the attorneys for the petitioner by depositing the same in the United States mail, postage prepaid, at New York City, New York, addressed to said attorneys at their respective post office addresses.

September 4, 1951.

SIDNEY A. WOLFF.

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October Term 1951

No. 211

IN THE

SUPREME COURT OF THE UNITED STATES

OF AMERICA

MRS. ODILE V. HUBERT TUCKER, AS A STOCKHOLDER, ON BEHALF OF CRESCENT CITY LAUNDRIES, INC.,

Petitioner,

vs.

NATIONAL LINEN SERVICE CORPORATION, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

BRIEF FOR SIDNEY H. VICKNAIR, S. F. GREENBLATT, M. N. WEINSTEIN, MRS. EVELYN ROSE GOLDEN, HERBERT J. HAAS, JOSEPH F. HAAS, JACOB HAAS AND SIDNEY W. SOUERS,

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IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term 1951 No. 211

MRS. ODILE V. HUBERT TUCKER, AS A STOCKHOLDER, ON BEHALF OF CRESCENT CITY LAUNDRIES, INC.,

Petitioner.

vs.

NATIONAL LINEN SERVICE CORPORATION, ET AL.,

Respondents.

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BRIEF FOR SIDNEY H. VICKNAIR, S. R. GREENBLATT, M. N. WEINSTEIN, MRS. EVELYN ROSE GOLDEN, HERBERT J. HAAS, JOSEPH F. HAAS, JACOB HAAS, AND SIDNEY W. SOUERS,

Respondents.

1.

Opinion Below.

The opinion of the Court of Appeals was rendered on April 5, 1951 (R. 418) and is reported 188 Fed. 2d 265. Petition for Rehearing was filed April 25, 1951 (R. 420) and was denied May 10. 1951 (R. 426). The opinion of the District Court is reported in 92 Fed. Supp. 502 and is found in (R. 393).

Statement of the Case.

This statement is confined to the facts that are relevant to the consideration of the questions necessary to be considered on the application for certiorari.

The action is a stockholders' derivative action brought by petitioner, Mrs. Tucker, as a stockholder of Crescent City Laundries, Inc. against Crescent City Laundries, Inc., a Maine Corporation (Par. 12 of Complaint - R. 11) and some 63 other defendants.

Petitioner, Mrs. Tucker, is a citizen of Louisiana (R. 5).

The Complaint alleges that Crescent City Laundries, Inc. is in antagonistic hands (R. 225-226, Par. 407).

Of the other defendants named in the Complaint, 14 are citizens of Georgia (R. 13, 14, 20, 21); 41 are citizens and residents of Louisiana; six are foreign corporations, three of which (National Linen Service Corporation, Southern Linen Supply Corporation, and Atlanta Laundries, Inc.) are licensed to do business in Georgia; one a citizen of New York; one a citizen of Texas; and one a citizen of Missouri (R. 14-21).

Certain of the defendants, named as such in the Complaint, and who, it is contended by respondents, are indispensable parties, are citizens of Louisiana.

Others who, it is contended, are indispensable parties are citizens of other States and are not parties and cannot be brought into the District Court. The respondents claim that the following are indispensable parties to the relief sought against these respondents;

(1) Sidney W. Souers, a citizen of Missouri, over whom the District Court did not acquire jurisdiction (R. 21, 328).

(2) New Orleans Laundries, Inc., a Delaware corporation doing business in Louisiana but not in Georgia, over which the District Court did not acquire jurisdiction (R. 15, 308);

(3) John F. Finke, Trustee under the indenture securing bonds issued by Crescent City Laundries, Inc., a citizen of Louisiana who was not named as a party in his representative capacity and was not subject to the jurisdiction of the District Court. His citizenship is the same as that of the petitioner, Mrs. Tucker;

(4) Ralph C. Lally, Surviving Member of the Bondholders Protective Committee, also a citizen of Louisiana, over whom the District Court did not acquire jurisdiction;

(5) Mrs. Elizabeth McClellan Costley as Testamentary Executrix of Byron C. McClellan, a citizen of Louisiana over whom the District Court did not acquire jurisdiction (R. 16, 367);

(6) Charles Leftwich and W. Irving Moss, citizens of Louisiana. Neither of these was before the District Court. Moss was not even named, in the Complaint, as a defendant.

(7) Crescent City Laundries, Inc., a Maine corporation, licensed to do business in the State of Louisiana, but never licensed to do business nor transacted business in the State of Georgia, and upon whom service was had in Maine.

The Complaint, insofar as it seeks to set out a cause of action against the Georgia defendants, these respondents, is based upon the claim that in the organization of National Linen Service Corporation in 1928, 60,287 shares of the 150,000 shares of Common Stock then issued were wrongfully and fraudulently diverted from Crescent (then Laundry and Dry Cleaning Service Inc.) and Atlanta

Laundries, Inc. In substance the allegations are that under the contract (Exhibit C, R. 232-260) it was provided that Sidney W. Souers, a party to that contract, was to get, and did get 50,000 of the 150,000 shares of Common Stock of National Linen Service Corporation for organizing National Linen and underwriting its bonds or securities; that this was without any consideration and amounted to a fraud; that the Georgia defendants, these respondents, acquired portions of that 50,000 shares from Sidney W. Souers without paying therefor and with knowledge of the fraud; that 10,287 shares of the 50,000 shares that were to go, under the contract, to Crescent and Atlanta Laundries, Inc. were diverted by B. C. McClellan and his associates, who were officers and directors of Crescent, and that some of the 10,287 shares were given to certain of the Georgia defendants.

The prayers of the Complaint, as they relate to the 60,287 shares, are:

> "That the Court construe the memorandum agreement dated July 21, 1928, set out in Paragraph 32 hereof, together with the expanded agreement dated July 27, 1928, hereto attached as 'Exhibit C,' the stockholders' resolution of August 23, 1938, set out in Paragraph 53 hereof, the Voting Trust Agreement hereto attached as 'Exhibit D' and 'Exhibit D-1', and the facts herein alleged, and determine and declare the equitable interest of Crescent City Laundries, Inc., in and to the trust estate consisting of 150,000 shares of original common stock of National Linen Service Corporation which were delivered to the Voting Trustees named in 'Exhibit D' on November 16, 1928."

and

> "That judgment be rendered in favor of Crescent City Laundries, Inc., against the defendants, I. M.

Weinstein, A. J. Weinberg, J. B. Jacobs, Sidney W. Souers, Trust Company of Georgia, Executor of George H. Fauss, T. A. Martin, Herbert J. Haas, Mrs. Evelyn Rose Golden, S. H. Vicknair, S. R. Greenblatt, M. N. Weinstein, Joseph F. Haas, Jacob Haas, and National Linen Service Corporation, for the highest value attained by 39,627 shares of said stock, plus all dividends paid thereon, together with interest upon the amounts of such dividend payments at the rate of 7% per annum from the respective dates when such payments were made until the date of said judgment."

and

"In the alternative . . . if, and only if, the Court should find that the 50,000 shares of said common stock which was allocated to Sidney W. Souers was legally allocated to him under the facts and circumstances herein alleged, complainant demands judgment in favor of Crescent City Laundries, Inc., and against the defendants, (naming the same defendants above except Joseph F. Haas and Jacob Haas) for the highest value attained by 31,198 shares of said stock . . . "

and

"In the event the Court should determine that Crescent was not the equitable owner of either 39,627 or 31,198 of said shares, complainant demands judgment in favor of Crescent City Laundries, Inc., and against the defendants, (naming the same defendants except Joseph F. Haas and Jacob Haas) for the highest value attained by 7,823 shares of said stock . . . "

and

"That an accounting be had under the direction and jurisdiction of the Court to ascertain and determine the amounts of income and dividends which have accrued and which have been paid on the shares of stock . . . " (R. 227-229).

As the District Judge pointed out in his opinion (R. 395), 92 Fed. Supp. 502:

"The complaint is based generally upon two separate transactions, both alleged to be fraudulent. The first is the transaction whereby National Linen Service Corporation was formed. Concerning that, it is charged that Crescent received less of the common stock of the National Linen Service Corporation than it was entitled to receive, due to fraudulent conduct on the part of numerous persons. That transaction was completed in 1928.

"The Georgia defendants participated only in this first transaction.

"The second transaction was the sale of all Crescent's assets by a Louisiana sheriff in July, 1942. This sale was had pursuant to a judgment rendered in a Court of competent jurisdiction against Crescent in a suit to recover on its defaulted bond issue. The Louisiana sheriff's sale divested Crescent of all its property, including the right of action plaintiff here seeks to assert. It is apparent that the second transaction, unless it may be set aside, is a complete bar; . . . "

As to the second transaction referred to by the District Judge, the Georgia defendants, these respondents, are concerned only for the following reasons and to the extent indicated. If, as the District Judge pointed out, the sale by the sheriff under the Louisiana State judgment is not set aside, then any right of action that may ever have existed as to the 60,287 shares was divested from Crescent and was acquired by the Bondholders' Protective Committee which in turn sold and conveyed the same to New Orleans Laundries, Inc. Ralph C. Lally is the surviving member of the Bondholders' Protective Committee. The judgment under which the assets were sold was obtained in the Louisiana State Court by John F. Finke as Trustee under the bond issue. It is, therefore, contended, in behalf of respondents, that John F. Finke, as Trustee, Ralph C. Lally, surviving member of the Bondholders' Protective

Committee, and New Orleans Laundries, Inc. are indispensable parties. Two of these, John F. Finke and Ralph C. Lally, are citizens of Louisiana. Neither of the three (New Orleans Laundries, Inc., Finke, or Lally) was legally served or appeared so as to become a party in the District Court.

The District Judge held: (R. 400-403; 92 Fed. Supp. 502)

> "What has been said would seem to be sufficient. But there are Georgia defendants, as to whom there is diversity with reference to the stockholder plaintiff, and it might be said that the Louisiana defendants whose presence defeats jurisdiction should be stricken and the suit permitted to proceed as against the Georgia defendants.
>
> "This exact point was not before Judge Borah, although defendants who were non-residents of Louisiana were joined there and dismissed.
>
> "Here, many Louisiana defendants are indispensable parties, including Finke, Trustee, the plaintiff in the Louisiana proceedings in which Crescent's assets were sold, and Ralph C. Lally, surviving representative of the Bondholders' Protective Committee, who were the purchasers at the sale. (Complaint, Paragraphs 336, 337). No request has been made by the plaintiff to dismiss these Louisiana defendants, and the court must decide the case as it stands. Even if such a motion had been made, the granting of this relief and the dismissal of these defendants, particularly Lally, the purchaser, would raise serious doubts regarding the jurisdiction of this court to entertain the complaint at all.[4]

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[4]In Kohler v. McClellan, 156 F. 2d 908, certiorari denied 329 U.S. 781, a case involving the identical assets here involved, the Circuit Court ruled at page 910, "Therefore, in the absence of the owner of all claims of Crescent sold at the Sheriff's sale (Ralph C. Lally and associates, the Bondholders' Protective Com-

* * *

"Sidney W. Souers and New Orleans Laundries, Inc., are indispensable parties who do not reside in Louisiana. Both have appeared specially to challenge the validity of the service upon them, the jurisdiction of this court of their persons, and the propriety of the venue. Souers resides in Missouri, and New Orleans Laundries, Inc., is a corporation of Delaware without a Georgia domicile.

* * *

"A defendant may waive questions of venue and of jurisdiction of the person and consent to be sued anywhere. But Souers and New Orleans Laundries have not done so. Their privilege not to be sued in this court has been seasonably asserted, and must be sustained. *Macon Grocery Co. v. Atlantic Coast Line,* 215 U. S. 501, 508; *Burckhardt v. Northwest Natl. Bank, et al.,* (C.C.A. 9) 38 Fed. (2) 568, 573.

"The service upon Souers and the other non-resident defendants was made pursuant to the *ex parte* order of August 8, 1949, apparently issued upon the idea that 28 U.S.C. 1655 is applicable."

The District Court dismissed the suit as to all defendants (R. 393-397; reported in 92 Fed. Supp. 502), holding:

(1) That the Federal Court has no jurisdiction of a stockholder's derivative action, jurisdiction of which is based on diversity of citizenship, where there is a lack of diversity between the complaining stockholder and many of the defendants who are indispensable parties to the action even though the corporation, in whose behalf the suit is brought, has citizenship diverse to that of the other defendants.

mittee, who are the owners here referred to) the court below could only adjudicate upon the claims connected with and arising out of the sale itself." (The balance of the opinion and subsequent reports of the litigation, 77 F. Supp. 308, affd. 174 F. 2d 936, disclose that the only claim reserved was the claim against the estate of McClellan for damages "growing out of the allleged plan to wreck Crescent and the consequential Sheriff's sale of Crescent's assets under said plan."

(2) That the Court will not realign the wronged corporation on the side of the plaintiff where it is alleged that the corporation is in antagonistic hands.

(3) That Sections 1401 and 1695 of the Judicial Code carry forward Section 112 of Title 28 U.S.C. as amended April 16, 1936, and govern only venue and not jurisdiction, and, therefore, jurisdiction cannot be sustained where the plaintiff is a Louisiana citizen; many of the alleged wrongdoers are also Louisiana citizens even though the wronged corporation is a citizen of Maine; and that the venue of the United States District Court for the Northern District of Georgia was improper because it was not the residence of the plaintiff, the wronged corporation, or all of the defendants.

(4) That the service upon Sidney W. Souers, a resident of Missouri, and upon the New Orleans Laundries, Inc., a corporation of Delaware and doing business only in New Orleans, Louisiana, and without a Georgia domicile, respectively, by the United States Marshal in Missouri and the United States Marshal in New Orleans, was ineffective and invalid.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of dismissal in the case, basing its judgment on the decision in Mrs. Odile V. Hubert Tucker, et al., v. New Orleans Laundries, Inc., et al., decided the same day, April 5, 1951. The decision in the District Court and in the Circuit Court sustained the Motion to Dismiss, because the District Court was without jurisdiction not only because of the lack of diversity of citizenship between the plaintiff and all indispensable parties defendant, but also because of the absence of certain indispensable parties who were either not parties to the suit, Finke, Trustee, and W. Irving Moss, residents of

Louisiana, or Sidney W. Souers, a resident of Missouri, and New Orleans Laundries, Inc., a Delaware corporation with Louisiana domicile, who were parties to the suit, but had contested the service and venue, and other residents of Louisiana sought to be made parties and served under Section 1655 of the Judicial Code, who contested the jurisdiction and venue.

On the question of jurisdiction, the issues to be decided by this Court are:

(1) Whether in a stockholder's derivative action, jurisdiction of which is based on diversity of citizenship, the citizenship of the plaintiff to be used for determining diversity is that of the complaining stockholder or that of the injured corporation in whose behalf the action is brought, where the petition alleges that such corporation is an antagonistic hands; (2) whether Sections 1401 and 1695 of Title 28 U.S.C. govern both jurisdiction and venue, or only venue; (3) whether the Court has jurisdiction over any defendant because of the absence of indispensable parties; and (4) whether Section 1655 of Title 28 U.S.C. confers jurisdiction on the Federal Court in the absence of diversity of citizenship; or where diversity exists, merely provides machinery for bringing before the Court nonresident defendants in an action claiming a lien upon or ownership of property within the jurisdiction of the Court.

ARGUMENT.

Point 1.

CITIZENSHIP OF COMPLAINING STOCKHOLDER AND NOT CITIZENSHIP OF INJURED CORPORATION IS THE CONTROLLING FACTOR FOR DETERMINING DIVERSITY IN A STOCKHOLDER'S DERIVATIVE ACTION WHERE THE PETITION ALLEGES THAT THE INJURED CORPORATION IS IN ANTAGONISTIC HANDS.

The jurisdiction of the Federal Court in this case is invoked solely on the ground that the action is between citizens of different States, and that the amount in controversy exceeds 3,000.00. It is settled beyond controversy that diversity of citizenship to confer jurisdiction by the Federal Court exists only where all of the indispensable parties on one side of the controversy are of different citizenship from all the indispensable parties on the other side. *Strawbridge v. Curtis,* 3 Cranch 267, 7 U. S. 267. All Federal Courts have consistently held to this principle, and only recently in the case of *American Fire & Casualty Company v. Finn,* decided April 9, 1951, 95 L. Ed. 473, this Court vacated a judgment based upon a verdict against one defendant, and which had exonerated a defendant of the same residence as the plaintiff therein, holding at page 480:

> "The jurisdiction of the Federal Courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties (cases cited). To permit a Federal Trial Court to enter a judgment in a case removed without right from a State Court where the Federal Court could not have original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdic-

tion and give District Courts power the Congress has denied them."

Petitioner seeks to have the Court realign Crescent City Laundries, Inc., on the side of the plaintiff and disregard the citizenship of petitioner stockholder on the ground that Crescent City Laundries, Inc. is the real party plaintiff in interest, and that the petitioner stockholder is a mere nominal party. But in a stockholder's derivative action, the corporation whose right is asserted, is properly aligned as a defendant where, as here alleged, it is in antagonistic hands.

In *35 Corpus Juris Secundem, verbo Federal Courts*, Section 59, page 885, the rule is stated, as follows:

> *"Stockholders' suits.* The rule which aligns parties according to interest does not apply to stockholders' suits brought against the corporation and others on a cause of action, existing in favor of the corporation, where such suit is not collusive but is brought by plaintiff because the corporation is controlled by interests antagonistic to him . . . Where defendants against whom judgment in behalf of defendant corporation is sought are residents of the same state as plaintiff stockholders, although defendant corporation is a corporation of another state, *there is not such diversity of citizenship as will confer jurisdiction on a Federal Court."* (Italics supplied).

Commencing with the leading case of *Dodge v. Woolsey*, 18 Howard 331, 59 U. S. 331, and continuing in an unbroken line of authority, the Federal Courts have in this class of cases treated the citizenship of the complaining stockholder, and not that of the injured corporation, as the controlling factor in determining plaintiff's citizenship for the purpose of testing diversity. In that case this Court said at page 346:

"Mr. Woolsey's right, as a citizen of the State of Connecticut, to sue citizens of the State of Ohio in the Courts of the United States, for that State cannot be questioned. The papers in the case also show, that the directors and himself occupy antagonistic grounds in respect to the controversy which their refusal to sue forced him to take in defense of his rights as a shareholder in the bank."

In *Doctor v. Harrington,* 196 U. S. 579, plaintiff, a citizen of New Jersey brought a derivative suit in the Circuit Court of the United States for the Southern District of New York, on behalf of Sol Sayles Company, a New York corporation, joining New York citizens as defendants. The contention was made that the Federal Court had no jurisdiction because the injured corporation should be aligned on the same side as the plaintiff, and as thus aligned there would be no devirsity of citizenship between the injured corporation and the defendants, all of whom were citizens of New York. But the Court sustained the jurisdiction on the ground that there should be no realignment in stockholders' derivative suits where the corporation is controlled by interests antagonistic to complainant, and that the controversy was between the complaining stockholder, a citizen of New Jersey, and wrongdoers, who were citizens of New York. In that case the Court said:

"The ninety-fourth rule in equity contemplates that there may be, and provides for, a suit brought by a stockholder in a corporation founded on rights which may properly be asserted by the corporation. And the decisions of this court establish that such a suit, when between citizens of different States, involves a controversy cognizable in a Circuit Court of the United States. The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be

under a control antagnostic to him, and made to act in a way detrimental to his rights. In other words, his interest, and the interests of the corporation, may be made subservient to some illegal purpose. If a controversy hence arise, and the other conditions of jurisdiction exist, it can be litigated in a Federal Court."

* * *

"It was said in *Dodge versus Woolsey* that the refusal of the directors to sue caused them and Woolsey, who was a stockholder in a corporation of which they were directors, 'to occupy antagnostic grounds in respect to the controversy which their refusal to sue forced him to take in defense of his rights . . . ' "

Neither in the statement of facts by Mr. Justice McKenna, or in his opinion for the entire Court, is there any suggestion or implication that the suit was other than a derivative action to redress the wrongs committed upon the corporation in which the plaintiff was a stockholder at the hands of its managing directors.

In *Venner v. Great Northern Railway,* 209 U. S. 24, plaintiff, a citizen of New York, brought a stockholder's derivative suit in the State Courts of New York against Great Northern Railway, a citizen of Minnesota, and the President of the Railroad corporation, also a citizen of Minnesota. In resisting a removal of the case to the Federal Court, the plaintiff contended that the Federal Court was without jurisdiction because, upon a proper alignment of the parties which would put the Minnesota corporation on the side of the plaintiff, there would be a lack of diversity of citizenship between the plaintiffs and the defendant. In answering this contention this Court, speaking through Mr. Justice Moody, in an unanimous opinion said:

"First, was there a controversy between citizens of different States? As the parties were arranged by the

diversity of citizenship. The plaintiff was a citizen of plaintiff himself on the face of the record, there was a New York, and the two defendants were citizens of Minnesota. But the plaintiff insists that by looking through the superficial aspects of the controversy to its real substance it is seen that the railway company's interest is adverse to that of the other defendant, and the same as that of the plaintiff, and that, therefore, for the purpose of determining the jurisdiction, the defendant railroad should be regarded as a plaintiff. If this should be done there would be a citizen of Minnesota a plaintiff and another citizen of Minnesota a defendant, and the diversity of citizenship which is indispensable to the jurisdiction of the Circuit Court would no longer exist. Let it be assumed for the purposes of this decision that the court may disregard the arrangement of parties made by the pleader, and align them upon the side where their interest in and attitude to the controversy really places them, and then may determine the jurisdictional question in view of this alignment. (Citing cases). If this rule should be applied it would leave the parties here where the pleader has arranged them. It would doubtless be for the financial interests of the defendant railroad that the plaintiff should prevail. But that is not enough. Both defendants unite, as sufficiently appears by the petition and other proceedings, in resisting the plaintiff's claim of illegality and fraud. They are alleged to have engaged in the same illegal and fraudulent conduct, and the injury is alleged to have been accomplished by their joint action. The plaintiff's controversy is with both, and both are rightfully and necessarily made defendants, and neither can, for jurisdictional purposes, be regarded otherwise than as a defendant. (Citing cases). The case of *Doctor v. Harrington* is precisely in point on this branch of the case, and is conclusive. In that case the plaintiffs, stockholders in a corporation, brought an action in the Circuit Court against the corporation and Harrington, another stockholder, 'who directed the management of the affairs of

the corporation, dictated its policy and selected its directors'. It was alleged that Harrington fraudulently caused the corporation to make its promissory note without consideration, obtained a judgment on the note, and sold, on execution, for much less than their real value, the assets of the corporation to persons acting for his benfit. On the face of the pleadings there was the necessary diversity of citizenship, but it was insisted that the corporation, because its interest was the same as that of the plaintiff, should be regarded as a plaintiff. The court below so aligned the corporation defendant, and, as that destroyed the diversity of citizenship, dismissed the suit for want of jurisdiction. This court reversed the decree, saying, p. 587: 'The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him and made to act in a way detrimental to his rights. In other words, his interests, and the interests of the corporation, may be made subservient to some illegal purpose. If a controversy hence arise, and the other conditions of jurisdiction exist, it can be litigated in a Federal Court.' There was, therefore, in the case at bar the diversity of citizenship which confers jurisdiction."

The decision in the Venner case has been cited by this Court with approval in *Hamer v. New York Railways Company,* 244 U. S. 274, and has been followed by the Circuit Courts of Appeal and District Courts. It has never been overruled or modified.

In the case of *City of Indianapolis v. The Chase National Bank of the City of New York,* 314 U. S. 63, this Court, in a divided decision, held that the primary and controlling matter in dispute placed one of the defendants, having the same residence as the other defendants, on the side of the plaintiff, and, therefore, there was no diversity of citizenship

requisite to confer jurisdiction upon the Federal Courts. This was not a stockholders' derivative action.

Respondents' contention, as set out on this point, is sustained by the following cases:

Hutchinson Box Board & Paper Company, v. Van Horn, 299 Fed. 424.

Nagle, et al. v. Wyoga Gas & Oil Corporation, et al., 10 Fed. Supp. 905.

Opici v. Cucamonga Winery, et al., 73 Fed. Supp. 603.

Smallen v. Louisville Fire & Marine Ins. Co., et al., 80 Fed. Supp. 279.

Kelly v. Queeney, 41 Fed. Supp. 1015.

J.R.A. Corporation v. Boylan, et al., 30 Fed. Supp. 393, Affirmed 109 Fed. (2) 1018.

Ashley v. Keith Oil Corporation, 73 Fed. Supp. 37.

Harris v. Brown, 6 Fed. (2) 922.

In *Koster v. Lumbermens Mutual Co.,* 330 U. S. 518, at page 522, the Supreme Court of the United States said:

> "The cause of action which such a plaintiff brings before the court is not his own but the corporation's. It is the real party in interest and he is allowed to act in protection of its interest somewhat as a 'next friend' might do for an individual, because it is disabled from protecting itself. If, however, such a case as this were treated as other actions, the federal court would realign the parties for jurisdictional purposes according to their real interests. In this case, which is typical of many, this would put Lumbermens on the plaintiff's side. Illinois corporations would then ap-

pear among plaintiffs and among defendants, and jurisdiction would be ousted. *Indianapolis v. Chase National Bank,* 314 U.S. 63. But Jurisdiction is saved in this class of cases by a special dispensation because the corporation is in antagonistic hands. *Doctor v. Harrington,* 196 U. S. 579."

The foregoing decisions show (a) that jurisdiction is always sustained in those cases in which there is a diversity of citizenship between the complaining stockholder and the defendants even though there is a lack of diversity between the injured corporation and the wrongdoers where the corporation is in antagonistic hands, and (b) that jurisdiction is always declined in those cases in which there is a lack of diversity of citizenship between the complaining stockholders and the defendants, despite the fact that there is diversity between the injured corporation and the wrongdoers, where, as here, the plaintiff's petition alleges that the corporation is in antagonistic hands.

Every decision involving a stockholder's derivative suit shows that the Federal Courts have consistently refused to realign the injured corporation on the side of the plaintiff, whether the effect of such realignment would be to save or to defeat Federal jurisdiction, where the plaintiff's petition alleges the corporation is in antagonistic hands.

Where, as here, the petitioner is a resident of Louisiana, and there are respondents who are also Louisiana citizens, then by every decision rendered on the question, there is no diversity of citizenship as to those defendants, regardless of the State of incorporation of the injured corporation, where petitioner alleges that the injured corporation is in antagonistic hands.

In order to comply with Rule 23 (b) of Federal Rules of Civil Procedure, there is an admission in petitioner's complaint that Crescent was in antagonistic hands, and, there-

fore, it was futile to demand that its directors and stockholders bring the action (R. 225).

In *Doctor v. Harrington, Supra,* the twentieth paragraph of the bill of complaint in compliance with equity rule No. 94 is, as follows:

> "The complainants were and each of them was a shareholder of the defendant Sol Sayles Company at the time of the transactions herein complained of. This suit is not a collusive one to confer upon a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. The complainants are unable to secure any corporate action on the part of the defendant Sol Sayles Company to redress the wrongs hereinbefore set forth, nor are they able to obtain any redress at the hands of the stockholders of the said defendant Sol Sayles Company. The board of directors of said corporation is under the absolute control and domination of the defendant John J. Harrington, and the said Harrington, by reason of having possession of a majority of the capital stock of the said corporation likewise controls the action of the stockholders. Although requested for information with regard to the facts hereinbefore set forth, he has refused to give any information with regard thereto, and has declined to redress the wrongs of which complaint is herein made, or to give to the complainants any opportunity to lay before the board of directors or the stockholders of the defendant Sol Sayles Company the facts herein set forth."

Such allegation serves the same purpose as Paragraph 407 of petitioner's complaint (R. 225).

Federal Rule of Civil Procedure No. 23 is former equity rule No. 27, which embodied former equity rule No. 94, and equity rule No. 94 was issued following the decision in *Hawes v. Oakland,* 104 U. S. 450. In that case as well as in the case of *Doctor v. Harrington, Supra,* and *Venner v. Great Northern Railway Company, Supra,* there were al-

legations of a type similar to that made by petitioner in the case at bar, to-wit: That the corporation, acting through its majority officers, directors, and stockholders, had fraudulently diverted its assets for the benefit of its officers, directors, and majority stockholders, and that fraudulent acts had thus been committed by the corporation under the domination and control of such officers, directors, and majority stockholders.

In *Venner v. Great Northern Railway Company, Supra,* the complaint filed in the State Court contained the allegation that before bringing the suit the plaintiff demanded of the Great Northern Railway Company that it bring suit against Hill to compel him to account for and pay over to it the wrongful profit which he had obtained, and the Railway refused to comply with this demand. This was a partial compliance with equity rule No. 94.

These cases only hold that equity rule No. 94 required the petition to allege either a demand upon the corporation to act and its refusal, or to give reasons why such demand was not made.

In the case at bar petitioner alleges that she made no demand on the corporation to sue, because it would be futile, and assigned as reasons therefor the fact that Crescent was under the control of directors and stockholders who had caused it to commit fraudulent acts.

In *Hamer v. New York Railways Company, Supra,* at page 275 the Court said:

> "It is clear that the interest of the Trust Company in this controversy lies wholly with the plaintiffs. This is shown, among other things, by the request in its answer that the relief prayed for in the bill be granted. No reason is assigned in the bill or in the answer of the Trust Company for its refusal to sue; and none sug-

gests itself save the willingness of an accommodating trustee to enable its beneficiaries to present that appearance of diversity of citizenship essential to conducting this litigation in the Federal Court. It is not contended that this refusal to sue makes the Trust Company an adversary, to be classed for purposes of jurisdiction with the real defendants,— as in those cases where the refusal to sue was part of a fraudulent participation in the wrongdoing, and where the trustee or corporation in effect ranged itself in opposition to the relief sought. (Citing *Venner v. Great Northern Railway Company, Supra,* and *Doctor v. Harrington, Supra,* and other cases). (Italics supplied).

Far from being an authority to sustain the position of petitioner, this case affirms the proposition laid down in *Venner v. Great Northern Railway Company, Supra,* and *Doctor v. Harrington, Supra,* that the wronged corporation must in reality be considered for jurisdictional purposes a party defendant.

Point 2.

SECTION 1401 AND SECTION 1695 OF TITLE 28 U.S.C. GOVERN ONLY VENUE AND DO NOT CHANGE THE JURISDICTIONAL RULE AS TO DIVERSITY.

The venue provisions pertinent to the issues in this case are found in Title 28 U.S.C. Chapter 87-District Courts; Venue, Section 1391 (a) and (c), and Section 1401, which provide:

"Section 1391 (a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside.

* * *

(c) A corporation may be sued in any judicial district in which it is incorporated or

licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Section 1401: "Any civil action by a stockholder on behalf of his corporation may be prosecuted in any judicial district where the corporation might have sued the same defendants."

and Title 28 U.S.C. Chapter 113-Process, Section 1695, provides:

"Process in a stockholder's action in behalf of his corporation may be served upon such corporation in any district where it is organized or licensed to do business or is doing business."

Section 1391 and Section 1401 relating to venue only, do not in any wise change the jurisdiction of the subject matter granted the Federal Courts under the provisions of Title 28 U.S.C.A. Section 41. It has been repeatedly held that the above statutes relating to venue formerly incorporated under Section 51 of the Judicial Code and subsequently under 28 U.S.C.A. Section 112 relate solely to venue and do not in any wise affect the over-all jurisdiction of the subject matter granted to Federal Courts.

Camp v. Gress, 250 U. S. 308.

General Investment Company v. Lake Shore & M. S. Ry. Co., 260 U. S. 261.

Lee v. Chesapeake & Ohio Railway Co., 260 U. S. 653.

Robertson v. Railroad Labor Board, 268 U. S. 619.

Schoen v. Mountain Producers Corporation, 170 Fed. (2) 707 (C.C.A. 3rd 1948).

Greenberg v. Giannini, 140 Fed. (2) 550, (C.C.A. 2nd 1944).

The distinction between venue and jurisdiction, and no doubt, one of the clearest indications of the reason for con-

fusion between the question of jurisdiction of the subject matter and venue is set forth in *Camp v. Gress, Supra,* where Justice Brandeis used the following language (at 250 U. S. 311):

> "First. The several defendants below, although not citizens of the same State, were all citizens of States other than that of the plaintiff. Hence, the diversity of citizenship requisite to Federal jurisdiction existed . . . The objection of John M. Camp is not to the jurisdiction of a Federal Court, but to the jurisdiction over him of the Court of the particular District; that is, the objection to the venue . . ."

In the case of *General Investment Co. v. Lake Shore & M. S. Ry. Co., Supra,* the Supreme Court, referring to Section 51 said (at 435 S. Ct. 112):

> "This restriction, as repeatedly has been held, does not affect the general jurisdiction of a District Court over a particular cause, but merely establishes a personal privilege of the defendant, which he may insist on, or may waive, at his election, and does waive, where suit is brought in a district other than the one specified, if he enters an appearance without claiming his privilege . . ."

In the case of *Schoen v. Mountain Producers Corporation, Supra,* the Court said (at 170 Fed. (2) 713):

> "(1, 2) We conclude that in the case of stockholders' derivative suits, Sections 51, as amended by the Act of 1936 and modified by Section 52, authorized suit to be brought (a) in the district in which the plaintiff stockholder resided, (b) in a district in the State, if any, in which all the defendants including the injured corporation resided, and also, if there was diversity of citizenship between the injured corporation and all other defendants (c) in the district in which the injured corporation resided or (d) in a district in the State, if any, in which all the other

defendants resided. It follows that the district court was right in holding that since diversity of citizenship was lacking between Mountain Producers and all the other defendants the final clause of Section 51 did not authorize the plaintiff to bring this suit in Delaware, the district of Mountain Producers' residence. Accordingly the court's action in dismissing the complaint as to the non resident defendants Murphy, Johnson and Herndon was right and must be affirmed."

The distinction between jurisdiction of the subject matter and venue has been clearly established in those cases where jurisdiction of the subject matter rested upon grounds other than diversity of citizenship. Thus in *General Investment Co. v. Lake Shore & M. S. Ry. Co., Supra,* (where jurisdiction was based upon the Sherman Anti Trust Law) and in *Robertson v. Railroad Labor Board, Supra,* (where jurisdiction was based upon the Railway Labor Act), the Supreme Court clearly distinguished between the underlying issue of subject matter jurisdiction and the point raised in the cases under the venue statutes.

The distinction is also clearly made in those cases where the Courts pointed out that on the issue of jurisdiction of subject matter, the Courts themselves, on their own motion, will determine this issue, and it is one which cannot be waived by the parties under any circumstance, whereas the question of Venue is one of personal privilege, and must be raised by the defendant to whom it is applicable or it is waived.

In the case of *Peoria & P. U. Ry. Co. v. United States,* 263 U. S. 528, the Supreme Court said (at 44 S. Ct. 196):

> "... The provision that suit shall be brought in the district of the residence of the party on whose petition the order was made is obviously one inserted for his

benefit. If there were a lack of jurisdiction in the District Court over the subject matter, we should be obliged to take notice of the defect, even if not urged below by the appellee . . . But the challenge is merely of the jurisdiction of the court for the particular district. The objection is to the venue . . . This privilege not to be sued elsewhere can be waived, . . ."

In the case of *Greenberg v. Giannini, Supra,* Judge Learned Hand clearly makes the distinction between the question of jurisdiction as relating to subject matter and venue even if the law is construed as including jurisdiction in the sense of jurisdiction of the person. In that case the plaintiff, a citizen of New York, brought suit in the Federal Court of New York against Giannini and the Trans-America Corporation alleging himself to be a shareholder of the corporation and complaining of misappropriation of assets, etc. The plaintiff contended that since Giannini had removed the case from the State Court to the Federal Court, and since Giannini could have at the outset brought suit against Trans-America Corporation in the District Court for the Southern District of New York, that, therefore, that Court would have had substantive jurisdiction of the entire complaint; and although there would have been a defect in the venue, Giannini being a citizen of California, by not objecting could have waived the defect,—but the Court rejected this argument and said (at 140 Fed. (2) 553):

". . . Had the amendment to § 112 of Title 28, U.S.C.A. been directed to the substantive jurisdiction of the district court, that would have been a good argument, although in that event it would not have changed the law in application, because shareholders' actions in a federal court must always depend upon diversity of citizenship. But, not only was § 112 before the amendment concerned with venue alone, but so

was the amendment itself; and to extend it to include all cases in which a defendant abandons his privilege of insisting upon the prescribed venue, is to eviscerate it altogether."

The Supreme Court of the United States has recognized with approval the authority of the Reviser's notes in interpreting sections of the Judiciary Revision Act of 1948. In *United States v. National City Lines,* 337 U. S. 78, 69 S. Ct. 955, the Court said (at 69 S. Ct. 956):

> ". . .—Indeed, the Government urges us to disregard the reviser's notes which were printed in the House Reports. We cannot accept this position for the reasons discussed in our previous decisions today. The reviser's notes are so obviously authoritative in perceiving the meaning of the Code that the Government itself, in discussing a section other than § 1404 (a), refers to them in its brief in this case. And we have already had occasion to look to the reviser's notes. Stainback v. Mo Hoc Ke Lok Po, 1949, 336 U. S. 368, 376, n. 12, 69 S. Ct. 606, 610."

Likewise in *Ex Parte Collett,* 337 U. S. 55, 69 S. Ct. 944, Mr. Chief Justice Vinson refers to the Reviser's note (at 69 S. Ct. 950-951) on Section 1404 (a) of Title 28 U.S.C. as the authoritative construction of this section.

In Note 22 to the case of *Ex Parte Collett,* 337 U. S. 55, 69 S. Ct. 944 (at 69 S. Ct. 950) reference is made to the fact that the advisory committee charged with the revision of the Judicial Code was assisted by two special consultants, each an expert in the field of federal procedure: Judge Alexander Holtzoff, United States District Judge, District Court for the District of Columbia, and Professor James W. Moore of Yale University.

In *Moore's Federal Practice,* Volume 3, (Second Edition), Pages 3541 to 3544 inclusive, are devoted to a con-

sideration of the judiciary revision act of 1948 with particular respect to Section 1401. This authoritative commentator reaches the conclusion that Section 1401 makes no change in the prior venue statute as amended in 1936. The following is quoted from Moore's Federal Practice, Volume 3, (Second Edition), Pages 3541 to 3544 inclusive:

> "The foregoing resume presents the situation as to venue and *forum non conveniens* at the time of the enactment of the Judicial Code and Judiciary Revision Act of 1948. How stands it now?
>
> "A substantial change, and an important one, is that an action is no longer to be dismissed for improper venue or for *forum non conveniens* provided there is a 'district or division in which it could have been brought'; if there is, the action is to be transferred to that place where timely objection is made. And a general principle of transfer to a more convenient form is provided even where the venue is proper.
>
> "The effect then of bringing an action in an improper venue or an inconvenient forum has been radically altered. But have the principles as to what constitutes proper venue been changed? While the Act of 1948 has made some verbal changes and has redistributed the former provisions dealing with venue and services of process in the shareholder's action, these effect no substantial change for reasons now to be detailed. It will be recalled that the general venue statute (which prior to the Act of 1948 was 28 U.S.C. § 112) provided that an action based solely on diversity could be brought in either plaintiff's or defendant's district, but in other actions it could be brought only in defendant's district. And that the amendment of 1936 added a special venue for shareholder's actions—where the corporation might have brought the action; and also provided for extraterritorial service of process upon the corporate defendant.

But this was construed as not depriving the plaintiff of his right to lay venue under the general provisions, which in a diversity case, would be in either plaintiff's district, or the defendants' district (as where the defendant corporation and the defendant wrongdoers resided in the same district or different districts of the same state). These principles have not been changed although the Act of 1948 has distributed the provisions of former § 112. Thus the general provisions of that section, apart from the amendment of 1936 adding a special venue for shareholder's actions and providing for extraterritorial service of process upon the corporate defendant, have been carried forward with some changes not here material as § 1391. The provisions of the 1936 amendment insofar as they related to venue appear in substance as § 1401, which provides:

> " ' Any civil action by a stockholder on behalf of his corporation may be prosecuted in any judicial district where the corporation might have sued the same defendants.'

"And the provisions of the 1936 amendment insofar as they related to extraterritorial service of process on the corporate defendant appear in substance as § 1695, which provides:

> " 'Process in a stockholder's action in behalf of his corporation may be served upon such corporation in any district where it is organized or licensed to do business or is doing business.'

"There can be little doubt that § § 1401 and 1695 are related and together carry forward the substance of the 1936 amendment, and that they do not detract from the venue provisions of § 1391. Illustrations will make this clear. Assume a shareholder's action based solely on diversity. Plaintiff may still lay the venue in *his* district under § 1391, but since in that event

he is not aided by § 1395 in serving process upon the corporate defendant, his action will fail for want of an indispensable party (the corporation) unless service upon it can be made within the state pursuant to Rule 4 (f). In addition, while the venue is proper, his action may fail as to one or more of the defendant wrongdoers for inability to make service upon him or them. Now assume that plaintiff is a citizen and resident of State 1 and the corporate defendant and the defendant wrongdoers are citizens and residents of State 2. He may bring his action in State 2 pursuant to § 1391, the general venue provision. This is the only tenable position to take, since if § 1401 were held to govern there would be no proper district, because the corporation, a citizen of State 2, could not have sued the defendant wrongdoers, also citizens of that state, in any district. Let us vary the facts in one particular by assuming that the defendant wrongdoers are citizens of State 3 (rather than State 2). In this situation the corporation, a citizen of State 2, could have sued them in either State 2 or State 3, and the plaintiff may do so under § 1401. If the action is brought in State 2 the venue is proper but service of process is limited by Rule 4 (f) to that state and hence to be valid process must be served upon the defendant wrongdoers in State 2. If the action is brought in State 3, the venue is proper and, if necessary for service to be made outside that state upon the corporation, § 1695 affords the basis.

"To summarize: (1) the Act of 1948 provides for transfer instead of dismissal of an action for improper venue or for *forum non conveniens*, and this is a substantial change; (2) in other respects the venue for a shareholder's action is to be determined by the principles developed under the prior general venue statute, as amended in 1936, and (3) when the venue is laid under § 1401 in the district where the corporation might have sued the defendant wrongdoers, extraterritorial service of process on the corporation may

be made pursuant to § 1695, just as under the 1936 amendment."

In "Moore's Commentary on the Judicial Code" (1949), at pages 186-187, Professor Moore gives his comments and observations with respect to Section 1401 of Title 28 U.S.C.A. in the following language:

"§ 1401. STOCKHOLDER'S DERIVATIVE ACTION. 'Any civil action by a stockholder on behalf of his corporation may be prosecuted in any judicial district where the corporation might have sued the same defendants.' This is not an exclusive venue for this type of action; it is an additional venue to that provided in § 1391 (a) for diversity cases and to the general residual venue for non-diversity cases provided in § 1391 (b). The reason for this conclusion appears in the history behind § 1401. Prior to 1936 former 28 U.S.C. § 112 (1926), which has now been carried forward as subsections (a) and (b) of § 1391, gave plaintiff a choice of venue in diversity cases—plaintiff's district or defendant's district; and in non-diversity cases, not covered by some special venue provision, venue was in the defendant's district. Former § 112 gave no separate or special treatments to the stockholder's derivative action, and since jurisdiction was usually predicated upon diversity the venue was either in plaintiff's district or the district where all the defendants resided, or if they resided in different districts of the *same* state then in any one of such districts. Since in the derivative action the corporation is an indispensable party defendant, an impasse sometimes resulted in mismanagement cases brought against directors and other corporate officers, either because service of process could not be made upon both the corporation and the alleged tortfeasor, or if service was effected the venue was improper as to the corporation or the tortfeasor. A solution was attempted in 1936 by adding at the end of former § 112 a provision that did two things: (1) provided a special

venue—where the corporation could have sued the wrongdoer (s) ; and (2) provided for extraterritorial service of process upon the *corporation*. It did not take away from the plaintiff the right to lay venue under the provisions of § 112 that preceded the matter added by the amendatory Act of 1936; but, in that case plaintiff could not avail himself of the 1936 provision for extraterritorial service of process upon the corporation. The Code has made no change in these doctrines. As noted, the provisions of former § 112 preceding the amendatory provisions of 1936 have been carried forward as subsections (a) and (b) of § 1391, and may be availed of by a plaintiff in a derivative action; but in that event he cannot make extraterritorial service of process on the corporation. The special and cumulative venue provision of the Act of 1936 has been carried forward without any substantial change as § 1401; and the provision for extraterritorial service of process upon the corporation has been carried forward as § 1695, and may be utilized when the venue is laid pursuant to § 1401."

It is to be noted from the foregoing quotation that Professor Moore makes clear that Section 1401 merely provides an additional venue to that provided in Section 1391.

The above argument and authorities are set forth, because in the lower courts petitioner contended that Section 1401 enlarged the jurisdiction of the Federal Courts and did not relate solely to venue. This position has apparently been abandoned by petitioner in this Court, because petitioner's brief does not urge upon this Court the arguments made in the lower courts.

Section 1695 providing for service of process in a stockholder's derivative action can be of no avail to petitioner in this cause, because Crescent is a Maine corporation and was never licensed to do business or transacted any business in the State of Georgia.

This Court's attention is directed to the decision of Judge Hooper of the United States District Court for the Northern District of Georgia, 92 Fed. Supp. 502, at page 506.

> "Plaintiff contends that the question of jurisdiction is resolved by § 1401 of the Revised Judicial Code (28 U.S.C. § 1401), which provides that any civil action by a stockholder on behalf of his corporation may be brought in any district where the corporation might have sued the same defendants.
>
> "It is strongly argued that the section is one conferring jurisdiction upon federal courts, not one fixing the venue of suits of which Federal courts would otherwise have jurisdiction, and that under it the citizenship of the corporation only is to be considered in determining the question of jurisdiction.
>
> "The argument could well be answered by saying that even so the corporation could not sue in this district, since it does not reside here and some of the defendants reside elsewhere (See 28 U.S.C. § 1391), but § 1401 does not operate to create diversity where none exists; it merely provides an additional venue where the suit may be brought. (3 Moore's Federal Practice, (2d Ed.), § 23.21, p. 3542). Consequently it does not help plaintiff here."

In *LaVin v. LaVin,* 182 Fed. (2) 870 (C.C.A. 2nd 1950), it was directly held that Section 1401 has not extended the subject matter jurisdiction of Federal Courts in stockholders' derivative actions. There the Court (L. Hand, C. J.) after discussing the other questions here presented and analyzing the section and its history, said, at page 872:

> "Be that as it may, when we look at the course through Congress of the amendment, it becomes clear that no such jurisdictional expansion was contemplated . . ."

It is, therefore, submitted that Section 1401 of Title 28 U.S.C. does not in any way enlarge the jurisdiction of the Federal Courts as to subject matter in controversies between citizens of different states, but it merely provides an additional venue for stockholders' derivative action where original subject matter jurisdiction already exists.

POINT 3.

THE COURT IS WITHOUT JURISDICTION OVER ANY OF THESE RESPONDENTS BECAUSE OF THE ABSENCE OF INDISPENSABLE PARTIES.

The statement of facts shows that the following are indispensable parties:

(a) I. M. Weinstein, J. B. Jacobs, A. J. Weinberg, Byron C. McClellan, Charles Leftwich, Sidney W. Souers, and W. Irving Moss, who were the first Voting Trustees for common stock of National Linen Service Corporation.

W. Irving Moss, a resident of Louisiana, was not named as a party to the suit.

I. M. Weinstein, J. B. Jacobs, and A. J. Weinberg, are residents of the Northern District of Georgia and were regularly served with process.

Sidney W. Souers, is a citizen and resident of the State of Missouri (R. 21) over whom the District Court did not acquire jurisdiction (R. 21, 328). The only purported service upon him was by virtue of the ex parte order dated August 9, 1949, (R. 293) pursuant to the provisions of Title 28, U.S.C. Section 1655 (R. 231). The attempted service was by the United States Marshal for the Eastern District of Missouri, leaving a copy of the order and of the complaint at his (Souers') usual place of abode with a

member of his household over the age of fifteen years, his sister-in-law (R. 238). The ex parte order for service was sought (R. 231) and was granted on the theory that as against Souers and other non-resident defendants the action was to enforce an equitable lien upon a claim to personal property within the Northern District of Georgia (R. 293). This is hereinafter discussed in Point 4.

The Executors of the Estate of Byron C. McClellan and the Executors of the Estate of Charles Leftwich were served by the Marshal of the United States for the Eastern District of Louisiana under the ex parte order dated August 8, 1949, (R. 293). Within due time the Executors of the Estate of B. C. McClellan (R. 367) and the Executors of the Estate of Charles Leftwich (R. 365) contested the service, expressly objecting to the jurisdiction of the Court and the lack of legal service upon them.

(b) John F. Finke, Trustee under the indenture securing bonds issued by Crescent City Laundries, Inc., a resident of the Eastern District of Louisiana, was made a party to the suit in his individual, but not representative, capacity.

Ralph C. Lally, surviving member of the Bondholders' Protective Committee of Crescent City Laundries, Inc., a resident of the State of Louisiana.

New Orleans Laundries, Inc., a Delaware corporation, doing business in Louisiana, but not in Georgia, was served under the ex parte order dated August 9, 1949, (R. 293).

Sidney W. Souers is an indispensable Party to all the relief sought as against these respondents.

The Statement of Facts in this brief shows that petitioner seeks to recover a judgment for damages against all respon-

dents on account of the alleged diversion of 60,287 shares of the common stock of National Linen Service Corporation issued in 1928 when the corporation was organized. The complaint sets up as "Exhibit C" the contract under which 50,000 shares were allotted to Souers and his nominees. Souers was a party to the contract. The complaint further alleges that some of the 50,000 shares were delivered to each of these respondents who were alleged to have received the same as nominees of Souers, and without having paid any consideration therefor. It further alleges that Souers received and retained a part of the 50,000 shares. The complaint further proceeds upon the idea that the Court should construe the contract, to which Souers was a party and under which he or his nominees were to receive the 50,000 shares, and declare the contract void insofar as it provided for the allotment of the 50,000 shares to Souers and his nominees. Petitioner in the complaint clearly recognizes that, as a necessary prerequisite to the recovery of any relief against these respondents with respect to this feature of the case, it is essential that the contract above referred to, insofar as it provided for the 50,000 shares to go to Souers and his nominees for underwriting the indenture of the new corporation, be cancelled and destroyed.

The first prayer of the complaint (R. 227) is that the "Court construe the memorandum agreement dated July 21, 1928 . . . together with the expanded agreement dated July 27, 1928, hereto attached as "Exhibit C." . . . and determine and declare the equitable interest of Crescent City Laundries, Inc. in and to the trust estate consisting of 150,000 shares of original common stock of National Linen Service Corporation which were delivered to the Voting Trustees named in "Exhibit D" on November 16, 1928." The complaint, as above pointed out, alleges that that part

of the agreement ("Exhibit C") providing for 50,000 shares of the 150,000 to go to Souers or his nominees, in consideration of his services and the underwriting of the indentures, was fraudulent and without consideration that Crescent and Atlanta Laundries, Inc., were entitled to 100,000 shares instead of the 50,000 shares stipulated in the contract.

It is obvious that any judgment sustaining any such contention would vitally affect Souers, as well as those who received any of the 50,000 shares as his nominees. Under such circumstances, it is, we think, self-evident that Souers is an indispensable party.

Shields v. Barrow, 58 U. S. (17 How.) 130;

Keegan v. Humble Oil & Refining Co.,
155 Fed. (2) 971 (CCA 5);

Hudson v. Newell, 172 Fed. (2) 848 (CCA 5);

Young v. Powell, 179 Fed. (2) 147, 151 (CCA 5);

United States v. Northern Pacific R. Co.,
134 Fed. 715 (CCA 8).

The rule as laid down in *Shields v. Barrow, Supra,* and which has been consistently adhered to, is that parties are indispensable if they have an interest in the matter in controversy "of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." That case decided that a bill to rescind a contract is a controversy of the nature referred to. "For, if only a part of those interested in the contract are before the Court, a decree of rescission must either destroy the rights of those who are absent, or leave the contract in full force as respects them; while it is set aside, and the contracting

parties restored to their former condition as to the others."

In *Hudson v. Newell, Supra,* the Court said at page 852:

> "We know of no exception to the rule that an instrument cannot be totally destroyed by decree unless all parties to it or their successors in interest are before the court."

Souers is not before the Court, and the Court could not render a decree binding upon him.

In *Keegan v. Humble Oil & Refining Company, Supra,* at page 973, this Court held:

> "The fact that the decree would not be technically binding upon the absent parties is not the controlling factor."

All of the voting trustees who were parties to the voting trust agreement ("Exhibit D"), or their personal representatives, are indispensable parties.

The voting trustees consisted of I. M. Weinstein, A. J. Weinberg, J. B. Jacobs, Sidney W. Souers, B. C. McClellan, Charles Leftwich and W. Irving Moss. The first three of the above named are citizens of Georgia and were duly served in this case. Sidney W. Souers is a resident of Missouri and has not been served and has not appeared and subjected himself to the jurisdiction of the court. W. Irving Moss is a citizen of Louisiana. He has not been named as a defendant and has not been served. B. C. McClellan was a citizen of Louisiana. He died in March 1946 and Mrs. Elizabeth McClellan Costley is his testamentary executrix. She is a citizen of Louisiana (R. 16). Charles Leftwich was a citizen of Louisiana; he died in 1945 and his estate is being administered under the laws of Louisiana by his heirs and personal representatives who are residents of Louisiana (R. 17).

The complaint alleges that, upon the organization of National Linen Service Corporation in 1928, under a resolution of the stockholders of that corporation (quoted in the record at pp. 41-44) National Linen Service Corporation issued a certificate of 150,000 shares of its common stock to the voting trustees named in the Voting Trust Agreement ("Exhibit D") (R. 263-280); that an express trust was thereby created for the 150,000 shares of common stock, the legal title to which trust estate was thereby vested in the voting trustees (R. 85). It is alleged that the voting trustees were guilty of a breach of trust by not issuing voting trust certificates for 100,000 of these shares to Laundry and Dry Cleaning Service, Inc. (now Crescent City Laundries, Inc.) and Atlanta Laundries, Inc.; that the voting trustees "in breach of their said trust" and in furtherance of a conspiracy to defraud "effected the diversion of the equitable interest of Laundry and Dry Cleaning Service, Inc. in and to 60,287 shares of the common stock of National Linen Service Corporation (consisting of its equitable interest in 10,287 shares out of the 50,000 shares which were allocated to Laundry and Dry Cleaning Service, Inc. and Atlanta Laundries, Inc. jointly, and its equitable interest in 50,000 shares allocated to Sidney W. Souers and/or his nominees, but which shares were jointly owned by Laundry and Dry Cleaning Service, Inc. and Atlanta Laundries, Inc.)" (R. 87).

The first prayer of the complaint seeks to have the Court construe "the stockholders' resolution of August 23, 1928 set out in paragraph 53 hereof, the Voting Trust Agreement hereto attached as "Exhibit D" and "Exhibit D-1" and the facts herein alleged, and determine and declare the equitable interest of Crescent City Laundries, Inc. in and to the trust estate consisting of 150,000 shares of origi-

nal common stock of National Linen Service Corporation which was delivered to the voting trustees named in "Exhibit D" on November 16, 1928" (R. 227-228).

The complaint then prays for judgment for damages against various persons including some of the persons who were voting trustees and various others who also received some of the 60,287 shares alleged to have been wrongfully diverted by the voting trustees.

It is submitted that the individual voting trustees or their legal representatives are indispensable parties.

It seems clear that any adjudication such as the complainant seeks, would necessarily affect the interest of each of the individual voting trustees as well as the interest of all persons who acquired or held any of the stock alleged to have been illegally diverted, and that such an adjudication, in the absence of a majority of the voting trustees, would leave the controversy in such a condition that its final termination would be wholly inconsistent with equity and good conscience.

Shields v. Barrow, 58 U. S. (17 How.) 130;

United States v. Northern Pacific R. Co.,
134 F. 715 (CCA 8);

Young v. Powell, 179 F. 2d, 147, 151 (CCA 5);

Hudson v. Newell, 172 F. 2d, 848 (CCA 5);

Keegan v. Humble Oil & Refining Co.,
155 F. 2d, 971 (CCA 5);

Calcote v. Texas Pacific Coal & Oil Co.,
157 F. 2d, 216 (CCA 5).

The effect of the complaint and the relief sought therein is to have the court construe the voting trust agreement and the 1928 contract under which National Linen was

organized and to declare and decree that those instruments did not authorize the voting trustees to issue the voting trust certificates for the 60,287 shares of common stock in the manner in which they were issued, and to have the court, in effect decree that the voting trustees were thereby guilty of breach of trust, and that the persons to whom said shares were issued acquired no title thereto. Such a decree would directly affect the interests of all of the voting trustees as well as that of all of the parties to whom any of the stock in question was issued. In *Keegan v. Humble Oil & Refining Co., supra,* this Court held:

> "We are of opinion that parties are indispensable when their interests in the subject matter of the suit and in the relief sought are so bound up with that of the other parties that their interest would be directly affected by the decree. This is the definition found in Shields v. Barrow, 58 U. S. 130, 17 How. 130, 158 L. Ed. 158, and Barney v. Baltimore, 73 U. S. 280, 6 Wall. 280, 18 L. Ed. 825.
>
> "The fact that the decree would not be technically binding on the absent parties is not the controlling factor. State of California v. Southern Pacific Company, 157 U. S. 229, 15 S. Ct. 591, 39 L. Ed. 683; Vincent Oil Company v. Gulf Refining Company, 5 Cir., 195 F. 434; Green v. Brophy, 71 App. D.C. 299, 110 F. 2d 539. And the fact that a joinder of the absent parties might deprive the court of jurisdiction does not make them any less indispensable. Barney v. Baltimore, 73 U. S. 280, 6 Wall. 280, 18 L. Ed. 825."

In *Hudson v. Newell, supra,* it was held that a suit seeking a declaratory judgment as to the meaning of leases could not succeed unless all claimants were parties to the suit.

John F. Finke, Trustee, Ralph C. Lally, surviving member of the bondholders' protective committee, and New Orleans Laundries, Inc., are indispensable parties.

As pointed out in the statement of the case, John F. Finke was the trustees under the indenture securing bonds that were issued by Crescent City Laundries, Inc. Those bonds having become in default, Finke, as trustee, filed suit in the state court in New Orleans to foreclose the bond indenture and for judgment against Crescent. This suit resulted in the rendition of a judgment in favor of Finke. Under that judgment, the property and assets of Crescent were sold by the sheriff. The Bondholders' Protective Committee purchased all of said assets at the sheriff's sale. The Bondholders' Protective Committee in turn sold those assets to New Orleans Laundries, Inc.

Among the assets thus sold and conveyed to New Orleans Laundries, Inc., were "all the debtor's (Crescent's) other choses in action and claims of any and every character against any and all persons whomsoever, whether or not shown upon the books of the debtor, and all the debtor's cash and other assets and effects of every name, character and description."

The complainant attacks the judgment, the sheriff's sales, and the sale by the Bondholders' Protective Committee to New Orleans Laundries in an effort to have it adjudicated in this case that Crescent owns and is entitled to prosecute the alleged causes of action against these respondents and others growing out of the alleged diversion of the 60,287 shares of stock in 1928 (R. 300). Without such an adjudication Crescent would have no rights in any such alleged causes of action; they would belong to New Orleans Laundries, Inc.

Judge Hooper held (R. 410) that Finke, Trustee, Lally,

the surviving representative of the Bondholders' Protective Committee and New Orleans Laundries, Inc., are indispensable parties. He cites the decision of this Court in *Kohler v. McClellan,* 156 F. 2d 908, a case involving the identical assets here involved. In that case (p. 910) this Court, after referring to the contentions there made to the effect that the sale of the alleged rights of action was void, held that "in the absence of the owner of all claims of Crescent sold at the Sheriff's sale, the court below could only adjudicate on the claims connected with or arising out of the sale itself." The *Kohler case* above referred to was brought and was then being prosecuted as a derivative certiorari denied 329 U.S. 781, action for the benefit of Crescent (see 156 F. 2d, p. 909). The same attack was sought to be made in that case on the judgment, the sheriff's sale and the sale to New Orleans Laundries, Inc., as is sought to be made in this case. As pointed out above, this Court held that the parties who acquired the assets by virtue of the sale are indispensable parties to any attack such as was sought there, and is sought here, to be made.

The principle is so well established as to be now considered as elementary, that a judgment of a court having jurisdiction of the parties and subject matter cannot be collaterally attacked, and that in any attack on such judgment the parties to the judgment are indispensable.

The Supreme Court of the United States in *Harwood v. The Cincinnati and Chicago Air Lines Railway Company,* 17 Wall. 78, 21 L. Ed. 558, had before it a similar complaint. The suit which was filed in 1865 sought to vacate a decree rendered in 1860 wherein George Carlisle, as Trustee, sought and obtained the foreclosure of a mortgage upon the defendant railroad. The basis of the prayer for vacating such decree was that there was fraud and collusion

between the plaintiff and others who were lessees of the road; that, as a part of such conspiracy the road was allowed to depreciate and the payment of interest was wilfully neglected so that the property should be sold, and that this resulted in a sale of the road and its purchase by the conspirators for a small sum to the injury of the plaintiffs and other stockholders of the Road. (Compare the allegations in the present complaint, paragraph 330, 333, 335, 352, 354, 357, and 362). In that case Carlisle, Trustee, the plaintiff in the foreclosure suit, was not a party to the proceeding in which the judgment was attacked. The Supreme Court held:

> "Mr. Carlisle, the plaintiff in the suit in which the decree is sought to be vacated, is not a party to this proceeding. In the former suit all the forms of law, at least, were complied with. The parties having interests which it was sought to foreclose were made parties, a decree was taken in the ordinary form that they be foreclosed and that the property be sold. A sale was had under which the present defendants claim title. This was done upon the prayer of Mr. Carlisle by his authority, and upon his procurement. Third parties now come into court and ask that all these proceedings, completed according to the forms of law, and sanctioned by the decree of the court, taken at the request of Mr. Carlisle and for which he is responsible, be vacated and declared fraudulent and void. This is sought to be done without his knowledge, and no opportunity is given to him to sustain his decree or to rebut the alleged fraud, and no reason or excuse is given why he is not made a party. This is against authority and principle. No case is cited to justify it, and it is believed that none can be found. The judgments of courts of record would be scarcely worth obtaining if they could be thus lightly thrown aside. The absence of the plaintiff in the original suit is a fatal defect." . . .

The parallel to the case at bar is so close that further comment would be superfluous.

In *Graham v. Boston, Hartford and E. RR Co.,* 118 U.S. 161; 30 L. Ed. 196, a case in which, among other things, it was sought to collaterally attack a mortgage foreclosure and sale on the ground of fraud, it was held:

> "The mortgage having been duly foreclosed in a state court, which had jurisdiction of the parties and subject matter, and the injured party having had opportunity to apply to the state court to reverse the decree of foreclosure, said decree cannot be reviewed in a collateral proceeding in a Circuit Court of the United States, upon the ground that it was obtained by fraud."

The Georgia decisions are definite and very strong on the point that the judgment of a court of a foreign state have jurisdiction of the subject matter and of the parties cannot be collaterally attacked on the ground of fraud.

If this case were pending in the State courts of Georgia, there is no question whatever that the courts would hold that such an attack as is here sought to be made on the Louisiana State court judgment would not be entertained by the Georgia courts. This being a suit founded on the alleged jurisdictional grounds of diversity of citizenship the same rule is applicable in the Federal court as would be applicable in the state court.

In *Alabama Great Southern R. Co. v. Hill,* 139 Ga. 224, 228, the Court said:

> "But it is said that a collateral attack on a judgment on the ground of fraud is allowable as an exception to the general rule. Dicta to this effect may be found in our reports. In some instances the remark is made in passing, without special reference to the point under

discussion; in others it will be found that the collateral attack was justifiable on the other principles . . . But in order to allow a collateral attack the judgment must be void. Civil Code, § 5968. The statute declares that 'the judgment of a court of competent jurisdiction can not be collaterally attacked in any other court for irregularity, but shall be taken and held as a valid judgment until it is reversed or set aside.' Therefore a judgment procured by fraud must be deemed as absolutely void before it can be collaterally attacked. While a judgment procured by fraud may be set aside for the fraud in direct proceeding, still, if the judgment is rendered by a court of competent jurisdiction, the parties are concluded by it until it is set aside." . . .

In *Wood v. Wood,* 200 Ga. 796 (2) it was held:

> "A judgment of a court of a foreign State having jurisdiction of the subject-matter and the parties can not be collaterally attacked in the courts of this State on the ground of fraud."

In *Saliba et al. v. Saliba,* 202 Ga. 279 (7) it was held:

> "In order to set aside a judgment, it is necessary that the parties thereto, or their representatives, be made parties to the proceeding in which it is sought to have that done."

Point 4.

WHETHER SECTION 1655 OF TITLE 28 U.S.C. CONFERS JURISDICTION ON THE FEDERAL COURT IN THE ABSENCE OF DIVERSITY OF CITIZENSHIP OR WHERE DIVERSITY EXISTS, MERELY PROVIDES MACHINERY FOR BRINGING BEFORE THE COURT NON-RESIDENT DEFENDANTS IN AN ACTION CLAIMING A LIEN UPON OR OWNERSHIP OF PROPERTY WITHIN THE JURISDICTION OF THE COURT.

Section 1655 of Title 28 U.S.C. provides:

"In an action in a district court to enforce any lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain."

The provision of the law was originally enacted not for the purpose of conferring Federal jurisdiction where it was lacking, but of providing machinery for enforcing a claim on property located within the jurisdiction where certain indispensable party defendants were absent provided the necessary diversity between the parties existed. It provides a process for bringing non-resident defendants before the Court where they have or are asserting a claim to property within the jurisdiction, but the prerequisite to a claim for any relief in any federal court based solely on diversity of citizenship is that all the indispensable parties on one side of the controversy are of different citizenship from all the indispensable parties on the other side. Petitioner can no more invoke the jurisdiction of a federal court in an action in rem than in an action in personam where the necessary diversity of citizenship is lacking.

Petitioner in her complaint contended that this is an action in rem against the absent respondents, but as to respondent Sidney W. Souers, the suit is in personam and not in rem. The prayers for relief construed in the light of the allegations in the complaint shows that the relief sought as against Souers is relief in personam which a court cannot grant against an absent defendant.

Kohagen v. Harwood, 185 Fed. (2) 276 (CCA 7);

Dan Cohen Realty Co. v. National Savings & Trust Co., 125 Fed. (2) 288 (CCA 6);

Wilhelm v. Consolidated Oil Co.,
84 Fed. (2) 739 (CCA 10);

Vidal v. South American Securities Co.,
276 Fed. 885 (CCA 2);

McQuillen v. National Cash Register Co.,
122 Fed. (2) 877, (CCA 4);

Maya Corporation v. Smith,
32 Fed. (2) 350 (D.C. Del.);

Bank of Commerce v. McArthur,
248 Fed. 138 (D.C. Fla.).

Even if a suit to declare a constructive trust as to property is one in rem as contemplated by Section 1655, which respondents do not concede, it would certainly be necessary that the complaint by proper allegations show that the absent defendant has or claims some interest in the res, before the court would order service upon him under Section 1655.

The prayers in petitioner's complaint show that all relief asked against Souers is relief in personam except that asked in Paragraph (j) of the prayers, and as to the res mentioned in Paragraph (j) of the prayers, it is nowhere alleged in the complaint that Souers has or ever had or claimed any portion thereof. On the contrary, the complaint refutes any idea that Souers ever had any such interest. In Paragraphs 346 (R. 199), 347 (R. 200), 353 (R. 202, 207), 356 (R. 209) of the complaint, it affirmatively appears that the shares of stock were distributed among the stockholders of New Orleans Laundries, Inc., and that Souers was not one of these.

As regards the claim for alleged wrongful diversion of 60,287 shares of stock of National Linen Service Corporation, it is abundantly clear that petitioner's claim is entirely

in personam, and, therefore, not the type of claim to which Section 1655 applies.

In the brief filed in the Circuit Court, petitioner stated "Crescent is entitled to prosecute *its claim for damages* resulting to said corporation on account of the illegal diversion of its equitable interest in 60,287 other original shares of common stock of National Linen Service Corporation as specified in the complaint"; and with respect to such shares petitioner further stated: "Two courses were open with respect to Crescent's claims for the diversion of its equitable interest in said 60,287 shares of stock. Crescent could seek to recover the stock by claiming title to it, or it could sue those participating in the fraudulent diversion for damages resulting to said corporation because of said diversion. The complaint is drawn upon the latter premises. *It seeks a personal judgment for damages* * * * ."

The only way in which petitioner attempts to bring any of the absent respondents into this claim for the 60,287 shares is upon the theory that the chose in action is a res within the State, and that Section 1655 applies for the purpose of giving the court jurisdiction of any claim which such absent respondents have or may have to such chose in action. This argument is fallacious because a claim for personal judgment for damages is not the type of res to which Section 1655 applies. (Citing *Kohagen v. Harwood, Supra, Wilhelm v. Consolidated Oil Company, Supra*).

The service upon Souers by leaving a copy at his usual place of abode was not sufficient to satisfy the requirements of Section 1655 even if that section were applicable. The language of Section 28 U.S.C.A. Section 1655 requires the service thereunder shall be "on the absent defendant *personally* if practicable, wherever found" . . . If such *personal* service is not practicable, then service shall be

made by publication for "not less than once a week for six consecutive weeks." The statute is to be strictly construed. *Jennings v. Johnson,* 148 Fed. 337 (CCA 5); *Maya Corporation v. Smith, Supra,* and cases cited. No personal service was made upon Souers, and the order was not published.

The District Court so found that Souers and other nonresident respondents did not waive questions of venue and of jurisdiction of the person and consent to be sued in the Northern District of Georgia. Their seasonable assertion of their privilege not to be sued in the Northern District of Georgia was sustained by the District Court and affirmed by the Court of Appeals.

Conclusion

Respondents respectfully submit that the petition for a writ of certiorari should be denied, because the decision in this case is in accord with the decision in *LaVin v. LaVin, Supra,* in its construction of Title 28 U.S.C.A. Section 1401, and because it is in full accord with all decisions of this Court beginning with *Dodge v. Woolsey, Supra.*

The opinion of the Court of Appeals in *Tucker v. New Orleans Laundries, Inc.,* 188 Fed. (2) 263, referred to in the opinion in this case, cites prior decisions of the Circuit Court of Appeals involving litigation over the same subject matter, which demonstrate that the allegations in petitioner's complaint are wholly without merit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 211

MRS. ODILE V. HUBERT TUCKER, AS A STOCKHOLDER, ON BEHALF OF CRESCENT CITY LAUNDRIES, INC.,
Petitioners,

v.

NATIONAL LINEN SERVICE CORPORATION, ET AL,
Respondents.

REPLY TO OPPOSING BRIEFS ON APPLICATION FOR CERTIORARI

William G. McRae
Richard A. Dowling
Attorneys for Petitioners.

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Respondents.

REPLY TO OPPOSING BRIEFS

The opposing briefs of Respondents discuss many questions which were before the court below, but which that court thought it unnecessary to decide.

Petitioners feel that a discussion of those questions here would be inappropriate because, as the lower court said, (R. 419):

> "the decision on the diversity issue is dispositive of the case, and makes unnecessary the consideration of those matters."

We shall refrain from discussing any issue here other than the diversity issue, except to point out in a footnote that the decision in *Kohler v. McClellan,* 156 F. 2d 908 adjudicated none of Crescent's rights here sought to be enforced against

National Linen Service Corporation, New Orleans Laundries, Inc., and the individual Georgia respondents.[1]

In discussing the diversity issue the opposing briefs make no mention of Section 1332, Title 28, United States Code, which confers jurisdiction upon district courts of all civil

[1]In Kohler v. McClellan, supra, Crescent was a real and not a nominal defendant. Kohler, a stockholder of Crescent, made Crescent an adversary by demanding the appointment of a receiver for Crescent under Louisiana Acts 1898, No. 159, Section 1, which the Court of Appeals, citing Louisiana cases, held to be "a complete demand, and not merely ancillary", . . . "one creating a new interest (right) in stockholders and creditors." Kohler thus sought to enforce an individual right against his corporation.

We hasten to add, however, that Judge Hutcheson, who spoke for the Court below in this case, concurred specially in the judgment in Kohler v. McClellan, supra, (p. 914), but disagreed to the extent that he did not think that such "complete demand" may be exercised as well in a federal as in a state court.

National Linen Service Corporation, New Orleans Laundris, Inc., and the Georgia respondents were not parties to the Kohler case. The court, referring to the absence of New Orleans Laundries, Inc., (p. 910) said:

> "Therefore, in the absence of the owner of all claims of Crescent sold at the sheriff's sale the court below could only adjudicate upon the claims connected with and arising out of the sale itself."

The record of that case in this Court, *329 U. S. 781*, shows that Kohler did not seek to recover for Crescent damages arising out of the breaches of trust by the Voting Trustees, in violation of their duties under the Voting Trust Agreement, which is the keystone of Crescent's claims here, insofar as the above designated respondents are concerned (Pars. 118-147, R. 85-97).

Kohler later abandoned Crescent's claims arising out of the sale, but sought to recover individually as though the facts constituted a direct, personal tort to himself and other minority stockholders. (Par. 374, R. 215) Kohler v. Humphries, 174 F. 2d 936.

Georgia Code, 1933, Section 108-423 provides:

> "All persons aiding and assisting trustees of any character, with a knowledge of their misconduct, in misapplying assets, are directly accountable to the persons injured."

Even if the Louisiana judgment of Finke, Trustee, v. Crescent upon its bonds be valid, the title to Crescent's claims here sought to be enforced against these designated respondents, could not be divested by the *involuntary execution* sale where the advertisement of said sale did not describe said claims and where there was no appraisal as required by law, and where the pretended appraisal was fraudulent and contrary to law (Pars. 290-342, R. 172-198). See: Gales v. Christy, Assignee, 4 La. Ann. 293; Dearmond v. Courtney, 12 La. Ann. 251; McGary v. Dunn, 1 La. Ann. 338; McDonough v. Graviers' Curator, 9 La. Ann. 524; Boisse v. Dickerson, 31 La. Ann. 741, 747; Mullins v. Jones, 153 La. Ann. 1094, 97 So. 202; Millsap v. Peoples, 218 S. W. 181, 182, 116 Texas 180; Louisiana Code of Practice, Art. 671; Baltimore v. Parlange, 25 La. Ann. 335.

These designated respondents can derive no benefit in this case from the obiter dicta of the court below in the companion case of Tucker v. New Orleans Laundries, Inc., 188 F. 2d 263, stating that that case was being continued "in complete disregard of the judgment of this court in Kohler v. McClellan." Such statement was not a ruling of the court, and entirely unnecessary to its decision affirming the judgment of the district court dismissing that case for lack of diversity jurisdiction.

actions wherein the matter in controversy is between citizens of different States, and exceeds $3,000.

Neither of the lower courts pointed out, nor have Respondents been able to point out wherein the complaint alleges any facts to show the existence of any controversy between Mrs. Tucker and any defendant. They could not do so because no such controversy is alleged, nor does any exist.

The only controversy stated is that which arose between Crescent and those who, pursuant to a conspiracy to defraud Crescent out of certain assets and to conceal the fraud, did fraudulently divert Crescent's equitable interest in Voting Trust Certificates for 60, 287 shares of National Linen Service Corporation common stock, in violation of duties imposed by the Voting Trust Agreement, (Par. 29-147, R. 24-97), and between Crescent and those who, after said fraud was discovered by Crescent, entered into a conspiracy with some of the persons who had participated in said fraudulent diversions and confected and executed a fraudulent plan or scheme having for its purpose the protection of said wrongdoers from having to account to Crescent for the frauds which they had perpetrated upon it, and to thus aid and abet a continuation of said frauds upon Crescent, and also having for its purpose the further diversion of a large portion of Crescent's remaining assets to some of said conspirators so as to unjustly enrich them at Crescent's expense, to the end that Crescent could no longer engage in business (Pars. 213-215(a), R. 123-125).

Clearly, such controversy was one between a citizen of Maine, on one side, and the conspirators who are citizens of states other than Maine, on the other side—hence one between citizens of different States, of which district courts are given jurisdiction.

Crescent might have submitted such controversy to a federal district court for adjudication but for the fact that it was

helpless to act because of the adverse personal interests of its majority directors and stockholders, who were disqualified to act for it against themselves.

Did this helplessness change the nature of the controversy or the relation of the parties toward it?

When this controversy was presented to a federal district court by Mrs. Tucker, as a stockholder on Crescent's behalf in a derivative action, was such controversy, ipso facto, converted into one between the stockholder, on one side, and the injured corporation and the wrongdoers on the other.

Respondents succeeded in getting both lower courts to answer all of the above questions in the affirmative.

Such ruling is a perversion of Section 1332, destructive of the jurisdictional integrity of federal courts, and violative of the fundamental principles of equity jurisprudence.

Crescent cannot be catapulted into a postion of antagonism to the enforcement of its own claims in a strictly derivative action brought by one of its stockholders on its behalf, simply because it is named a defendant.

As Justice Miller pointed out in *Arapahoe County v. Kansas Pacific Railway Co.*, 4 Dill. 284, 285:

> "By the rules and practices in equity the court allows him to be a defendant in the case; but the mere fact that he is placed as defendant in a suit in chancery, *never changes his relation to the controversy in the case*, and it is very clear that the interest of the Denver Pacific Railway Company is the interest of the plaintiffs; that their interest is identical—that the board of county commissioners are using the name of the Denver Pacific Company to carry on this suit solely for the benefit of that company. The Denver Pacific Company, being in the control of the defendants, refused to bring this suit, and the complainants, stockholders of the company, were

> of necessity compelled to make it a defendant, that it might be brought before the court; but when before the court, the company is entitled to recover against the other defendants."

The Denver Pacific Company, although in the antagonistic hands of its majority trustees who were the real defendants, and although it was named a defendant, was realigned by the court as a complainant because the controversy was between it and its antagonistic trustees, and federal diversity jurisdiction was sustained because the injured corporation and its controlling trustees were citizens of different States.

Such are the facts governing diversity jurisdiction here, and this is the first time the question of diversity jurisdiction has been presented to this Court for decision upon such a state of facts.

The cases relied upon by Respondents and which were cited with approval by the lower courts as authorizing their refusal to realign Crescent as a complainant in this case are, without exception, cases in which the suing stockholders sought to enforce an individual right against their corporation and made the corporation an adversary in the action. Such was not true in *Araphoe* v. *Kansas Pacific Railway Co., supra,* and such is not the case here.

This Court should grant a writ of certiorari to review the decision of the Court of Appeals below for all of the reasons and upon the authorities contained in our Petition and Brief in support thereof.

Respectfully submitted,

William G. McRae
Richard A. Dowling
Attorneys for Petioners.

CERTIFICATE

I hereby certify that I have this day, served a copy of the foregoing Reply to Opposing Briefs upon counsel for Respondents filing briefs by depositing same in the United States mail, postage prepaid, addressed to said counsel at their addresses as they appear of record herein.

This 21st day of September, 1951.

William G. McRae
Attorney for Petitioners.